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No. 865

In the Supreme Court of the United States

OCTOBER TERM, 1968

THE NEW YORK CENTRAL DEVELOPMENT CORPORATION, a Delaware Corporation, and **JONES & LAUGHLIN STEEL CORPORATION,** a Pennsylvania Corporation,
Plaintiffs-Respondents,

vs.

EDWARD J. BYCZYNSKI and **HELENA S. BYCZYNSKI,**
Defendants-Petitioners.

On Petition for Writ of Certiorari
to the Appellate Court of Illinois, Third District.

Petition for Writ of Certiorari

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Petition for Writ of Certiorari

Petitioners, Edward J. Byczynski and Helena S. Byczynski, respectfully pray that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois for the Third District entered in this cause in The New York Central Development Corporation, a Delaware Corporation, and Jones & Laughlin Steel Corporation, a Pennsylvania Corporation, vs. Edward J. Byczynski and Helena

S. Byczynski, No. 67-95, entered on May 20, 1968, reversing the judgment of the Circuit Court of Putnam County, Illinois. A Petition for Rehearing was timely filed in the Appellate Court of Illinois for the Third District and was denied on July 16, 1968. A Petition to Appeal to the Supreme Court of Illinois as a matter of right was denied on the 23rd day of September, 1968 and the judgment of the Appellate Court of Illinois for the Third District thereby became final on that date.

OPINION BELOW

The Opinion of the Appellate Court of Illinois is appended hereto as Appendix C. It is reported in 238 N.E. 2nd 414 and is not yet reported in Illinois Appellate Court Reports.

JURISDICTIONAL STATEMENT

The Opinion of the Trial Court of Putnam County, Illinois, is appended hereto as Appendix A. The opinion and judgment of the Appellate Court of Illinois for the Third District were filed and entered on May 20, 1968, reversing the judgment of the Circuit Court of Putnam County, Illinois (Appendix C). A Petition for Rehearing was denied by the Appellate Court of Illinois for the Third District on July 16, 1968, Appendix D. Petitioners' application to appeal to the Supreme Court of Illinois as a matter of right on the grounds that a constitutional question arising under the Constitution of the United States is involved for the first time as a result of the action and judgment of the Appellate Court of Illinois was denied on the 23rd day of September, 1968, and the judgment of the Appellate Court of Illinois for the Third District thereby became final on that date.

The jurisdiction of this Court is invoked under Section 1257 (3), Title 28, U.S. Code, providing for review by this Court for Certiorari of decisions of the highest Court of a State wherein a title, right, privilege or immunity is specially claimed under the Constitution or Statutes of the United States.

QUESTIONS PRESENTED

This is a case brought for specific performance of a contract for the sale of real estate. The Trial Court denied specific performance on the ground that the contract was clear and unambiguous. It refused to consider evidence that had been received over objection in the trial of the case without a jury of privileged conversations in a private consultation between petitioners and their attorney.

The contract provided that "the conveyance of above premises is conditioned upon conveyance of suitable exchange property to seller. Seller will sell only if suitable exchange property cannot be acquired by purchaser." The purchaser admittedly made no attempt to locate exchange property and was not in a position to convey exchange property to the sellers at the time it demanded conveyance of the property from the sellers who are the petitioners herein.

The disputed testimony was a conversation between Attorney Walter Durley Boyle and his clients, the petitioners herein, in which he allegedly told them shortly before the contract was executed that it was their obligation to locate the desired exchange property and that the purchaser, respondents herein, would not make any attempt to locate it. This testimony was objected to on the ground that it was a privileged communication. The petitioners also denied that this was said to them in the conversation with the attorney.

The Appellate Court of Illinois for the Third District reversed the judgment of the Trial Court holding that the contract was ambiguous and incomplete. It considered the evidence of the privileged communication between the petitioners and their attorney, affirmed by the attorney and denied by the clients. The consideration of this evidence by the Appellate Court was a material consideration of their reversal of the judgment of the Trial Court.

We contend in this petition that the Appellate Court of Illinois by considering the privileged communication between attorney and client effectively denied petitioners a hearing in which they had the aid of their counsel. The right to a fair hearing includes the right to the aid of counsel at that hearing. The denial of the right to consult with counsel in secret before trial is in effect a denial of the right to the aid of counsel at the trial. It is a denial of due process of law to the petitioners in violation of the Constitution of the United States, Amendment XIV.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment XIV, Sec. 1, which provides in part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

This case involves the interpretation of an option contract to purchase real estate whereby the defendants, Edward J. Byczynski and Helena S. Byczynski, gave to the plaintiff, New York Central Development Corporation, the option to purchase 370 acres of real estate in Putnam County, Illinois, for $330,000.00. (A. 4, 5) The clause of the contract in dispute in this case is "the conveyance of above premises is conditioned upon conveyance of suitable exchange property to seller. Seller will sell only if suitable exchange property cannot be acquired by purchaser."

Plaintiffs admit they made no effort to locate or acquire any exchange property suitable to the plaintiffs. (A. 9, 10, 11)

The facts leading up to the execution of the option were as follows:

In the latter part of October, 1964, Mr. Frank Tighe, Sam Hellenbrand and Jack Shaffer, representatives of the plaintiffs, came to Hennepin, Illinois, for the purpose of looking over and obtaining options on large tracts of land in the vicinity owned by quite a large number of persons in that area. (A. 33, R. 112) Someone had informed the New York Central representatives that Attorney Walter Boyle represented or would represent most of the landowners in the area. (A. 33, R. 112) Bassi brought these three men to Mr. Boyle's office. (A. 33, R. 112) This was before the Byczynskis had been approached or had come to see Attorney Boyle about this matter. (A. 33, R. 115) They had a general discussion with Attorney Boyle about obtaining options from landowners in the vicinity. Mr. Boyle pointed out that any sale would be for a substantial price and a capital gains tax problem would result. Installment

payments and the question of exchange property was discussed. Mr. Boyle stated that provisions for these problems would have to be in the options. (A. 30, R. 100, 101) The New York Central Development Corporation representatives recognized the fact that the landowners would have a capital gains tax problem and agreed that an exchange property provision could be inserted in the option. (A. 30, R. 101)

Early in November, the New York Central Development Corporation representatives again came to see Mr. Boyle. This, too, was before the time that Mr. Edward Byczynski had seen or employed Attorney Boyle in this matter. (A. 33, R. 115) The New York Central representatives furnished Mr. Boyle with a form of option they desired to use. (A. 34, R. 116) Thereafter, Mr. Boyle drafted an exchange property clause to be inserted in the option form. (A. 34, R. 119) He did this before the Byczynskis came to see him or employed him. (A. 34, R. 120) He did it for other parties, not the Byczynskis. (A. 34, R. 119) Except for the rider, and the typewritten insertion for the exchange property clause, the form used was the same one prepared by the New York Central Development Corporation. (A. 34, R. 119)

These early conversations between the New York Central representatives and Attorney Boyle were out of the presence of the defendants. Evidence of the conversations was objected to on the ground that at that time Attorney Boyle was not an attorney or agent for the defendants, that they were preliminary conversations later merged in the written contract, and they were further inadmissible because they would vary, alter or contradict a written instrument. (A. 29, R. 97, 98) The Court overruled the objection and permitted Attorney Boyle to testify as to the

conversation he had with the New York Central representatives. (A. 29, R. 97, 98)

Over this objection, Attorney Boyle tesitfied that he pointed out that he thought any clients that might come to him concerning the matter would not sell for anything less than a substantial value and there would be a capital gains to be considered. The question of installment payments was brought up and also the question of exchange property to be inserted in the option. Attorney Boyle stated that he insisted so far as he was concerned these would have to be in the option and the railroad, in case of the exchange, was to have no part in it, so that the price would not be raised on exchange property that his clients might be seeking to select. (A. 29, R. 97, 98) The railroad representatives left their form of option with Mr. Boyle and he prepared and inserted in it provisions with reference to an exchange of property. (A. 34, R. 119) Mr. Boyle's own family owned one of the tracts of land that the railroad was interested in purchasing. (A. 33, R. 112)

Thereafter, the railroad representatives went out to see the various landowners including the Byczynskis. (A. 49, R. 282) After discussions with the Byczynskis, they informed the defendants that they would take the papers to Attorney Boyle to prepare the option. In the Summary Judgment proceedings, which is a part of the record, defendants assert, and plaintiffs do not deny, that defendants paid Boyle $50.00 for preparing the option and plaintiffs reimbursed them for this $50.00 (A. 35, R. C128) There is no evidence that plaintiffs ever informed defendants that the New York Central representatives had discussed the matter with Attorney Boyle concerning the option or the form thereof.

Defendants did go to see Attorney Boyle concerning the option. (A. 28, R. 93, 94)

When Attorney Boyle was on the witness stand testifying, he was asked what the conversations were between himself and the Byczynskis concerning the option. (A. 31, R. 102) This was at a time when only Mr. Edward Byczynski and Attorney Boyle were present and Byczynski was consulting him as an attorney with reference to the preparation of the option. (A. 31, 34, R. 103, 126) Objection was made to these questions on the ground that the conversations between Byczynski and Attorney Boyle were privileged communications between attorney and client and the privilege was not waived. (A. 31, R. 102) Further objections were made that all preliminary oral conversations were merged in the written contract and that oral conversations were not admissible to vary, alter or contradict the written contract. (A. 31, R. 102) These objections were overruled at the time of the trial and the evidence received. (A. 31, R. 102, 103)

In response to the question, Boyle answered, "At that time, I told him that under the exchange provision he would be able to locate similar property, real property, and postpone the payment of capital gains taxes on his transaction with the New York Central Development Corporation. I told him that he would be able to locate this property himself without any interference from the Development Corporation, that he would have a reasonable time after the execution or completion of the option to locate the property." (A. 31, R. 104) Boyle was then asked what he said to Mr. Byczynski about his earlier discussion with the New York Central Development representatives about locating property. (A. 31, R. 104) The same objections were made to this question. (A. 32, R. 105) Boyle merely answered, "I told them I had worked

it out with the representative of the railroad that that would be the way it would be handled." Motion to strike the testimony was denied. (A. 32, R. 105)

Byczynski denied when he was on the stand that he was told by Attorney Boyle about the previous conversations with the railroad representatives or that defendants were required to find the exchange property. (A. 50, R. 300) The plaintiffs admit that they have made no attempt to locate exchange property. (A. 9, 10 Answer Par. 8 A. 11, 12, Reply Par. 2) The option that was executed provided that the purchaser may exercise the option on or before March 1, 1965, by giving written notice by United States Mail, addressed to the seller, and that upon payment of $33,000.00 to the seller prior to March 1, 1965, the option may be extended until March 1, 1966. (A. 5) Pursuant to the provisions of the option, the New York Central Development Corporation paid defendants $33,000.00 and extended the option until March 1, 1966. (A. 2, Complaint Par. 2) Thereafter, on September 14, 1965, the New York Central Development Corporation mailed to the defendants a letter purporting to exercise the option. (Plaintiffs Exh. 3, A. 54)

A meeting was held on September 16, 1965, in the law office of John Wosik in Henry, Illinois, at which representatives of both the plaintiffs and the defendants were present. (A. 42, R. 210) Between that time and October 29, 1965, there were several telephone conversations between Gralen, Attorney for plaintiffs, and Wosik, Attorney for the defendants. The conversations at this meeting and the phone conversations were excluded from evidence on the grounds that they were discussions attempting to arrive at a compromise and settlement of an existing dispute. (A. 45, 46, R. 255, 256)

REASONS FOR GRANTING THE WRIT

I.

The denial of the privileged communications rule between attorney and client violates the due process clause of the Federal Constitution.

At the trial of this cause, the attorney was compelled to testify subject to objection, to private consultations and communications between him and his clients, the defendants. However, the Trial Court disregarded this testimony in making its decision. It held that the written contract between the parties was clear, unambiguous and complete and that the case must be decided on the basis of the clear meaning of the written contract. The Appellate Court reversed this decision and held that the contract was ambiguous and incomplete. It considered the private communications between the attorney and client in interpreting the contract and making its decision in this case. We contend that this deprived the defendants of their property without due process of law in violation of the Federal Constitution. It was the decision and judgment of the Appellate Court that violated this constitutional guaranty for the first time. A question under the Constitution of the United States arises for the first time in and as a result of the action of the Appellate Court.

It is a fundamental rule of constitutional law that no man should be punished or deprived of his property without an opportunity for a fair hearing. A person affected by the judgment of a court has the right to be present and be represented by counsel in both civil and criminal proceedings. The right to a hearing includes the right to the aid of counsel in either criminal or civil proceedings. A

denial of the right to consult with counsel in secret before trial is in effect a denial of the right to aid of counsel at the trial. The privilege of a client not to have confidential communications between him and his attorney disclosed in court is one of the most ancient rights known to the law. It goes back to the reign of Queen Elizabeth in England long before the adoption of our Federal and State Constitutions. The law has always recognized that it is necessary to promote and foster freedom of consultation of legal advisers by their clients. If the court can compel disclosure of these confidential consultations then the apprehension on the part of the client of this compelled disclosure would effectively destroy the right to consult with an attorney before trial. While such a right may be more apparent in a criminal case, it is just as important and just as necessary in a civil case.

An attorney can properly represent a client only if he has the full confidence of that client. He will have that confidence only if the rule as to privileged communications is preserved. If a client's right to consult with his attorney is destroyed by abolishing the privileged communications rule, his right to effective representation at the trial, either of a criminal or civil case, is destroyed. He is thus deprived of his liberty or property without due process of law. This is the basis of our petition for writ of certiorari.

The rule that communications between attorney and client are privileged is one of the most ancient and fundamental rights known to our system of jurisprudence. The history and nature of the privilege is set forth by Professor Wigmore in "Wigmore on Evidence" 2nd Edition, Volume 5, Section 2290 as follows:

"The history of this privilege goes back to the reign of Elizabeth, where it already appears as unquestioned. It is therefore the oldest of the privileges for confidential communications. Inasmuch as the testimony of witnesses (in the modern sense) did not come to be a common source of proof in jury trials till the early 1500s (*ante,* par. 1364) and as testimonial compulsion does not appear to have been generally authorized until the early part of Elizabeth's reign (*ante,* par. 2190), it would seem that the privilege could hardly have come much earlier into existence; for there could have been but little material for its application. It thus appears to have commended itself, at the very outset, as a natural exception to the then novel right of testimonial compulsion.

"But the theory of its exclusion, in those days, was very different from that of modern times. It was an objective, not a subjective one,—a consideration for the oath and honor of the attorney, rather than for the apprehensions of his client. How significant the 'point of honor' was, until the end of the 1700s, in almost securing other exemptions from testimonial disclosure, has been already seen (*ante,* par. 2286). Clearly the attorney and the barrister are under a solemn pledge of secrecy, not less binding because it is implied and seldom expressed. 'The first duty of an attorney,' it has been said, 'is to keep the secrets of his clients.' If the 'point of honor' was to be recognized at all as a ground for exemption, then surely the attorney fell within this exemption. And no doubt this was, in the beginning, and so long as any countenance was given to that general doctrine, the theory of the attorney's exemption.

"That doctrine, however, finally lost ground, and by the last quarter of the 1700s, as already noticed (*ante,* par. 2286), was entirely repudiated. The judicial search for truth could not endure to be obstructed by a

voluntary pledge of secrecy; nor was there any moral delinquency or public odium in breaking one's pledge under force of the law. Doubtless the attorney's exemption would have fallen at the same time with the others of like origin, had not a new theory, ample to sustain and even to enlarge it, by that time come to be recognized. That new theory looked to the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal adviser *post,* par. 2291), and proposed to assure this by removing the risk of disclosure by the attorney even at the hands of the law. The new theory begins to appear in the early 1700s, coexists with the older one for half a century, and then, upon the latter's disappearance, begins for the first time to be much dwelt upon and thoroughly developed. One consequence of this tardy origin was that the detailed rules of this privilege (oldest though it really was) were still in the formative stage in the first half of the 1800s. Another and most unfortunate one was that, by reason of the inconsistency of the two theories, in some of their practical applications, the older notion, so far as represented in precedents, struggled along for some time by the side of the newer one, like two powerful streams debouching into the same channel; and until the domination of the newer one was finally established throughout its boundaries, a turbid and confused volume of rulings abounded. Probably in no rule of Evidence having so early an origin were so many points still unsettled until the middle of the 1800s.

* * *

"The policy of the privilege has been plainly grounded, since the latter part of the 1700s, on subjective considerations. In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory."

It has always been recognized that a right to a fair hearing is essential to the judicial process. In 16 *Am. Jur.* 2d, "Constitutional Law" Sec. 569, it is stated:

> "It was a maxim of the common law that 'no man should be punished without an opportunity of being heard.' Hence, no one may be legally divested of his property unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him, and be allowed to meet it on the law and facts and show if he can that it is unfounded. He must be given his 'day in court'."

This guaranty has been included in the Fourteenth Amendment to the United States Constitution.

It has also been recognized that a person does not have an effective hearing unless he has the right to be represented by counsel. The procedure in legal proceedings is such that it requires one skilled in the law to properly present a person's position and contentions to the court. In 16 *Am. Jur.* 2d "Constitutional Law", Section 573, it is stated:

> "One who might be affected thereby has the right to be present at the hearing in person and represented by counsel. The right to a hearing includes the right to aid of counsel, although such aid need not be given at early stages of the proceeding. A state or federal court which arbitrarily (sic) refuses to hear a party by counsel employed by and appearing for him in any case, civil or criminal, denies the party a hearing, and therefore denies him due process of law in the constitutional sense."

In *Prudential Insurance Co. of America* v. *Small Claims Court of the City and County of San Francisco,* 76 Cal. App.2d (adv. 465), 173 P.2d 38, 167 *A.L.R.* 820, it was held

that the right to a hearing includes the right to appear by counsel in both civil and criminal cases. The arbitrary denial of such right constitutes a denial of due process of law.

There has been some conflict of authority in criminal cases as to just when an accused person must be furnished with counsel. This conflict was settled by the United States Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 *A.L.R.* 3d 974, holding that an accused must be informed of his right to counsel and supplied with free counsel if necessary as soon as he is threatened with arrest.

This Court has not had occasion to consider whether depriving a client of the secrecy of communications between him and his attorney constitutes a deprival of due process of law. We submit that logically it does. The right to counsel in a civil trial is unquestioned. To deprive a person of this right deprives him of due process of law. If a person is not permitted to confer with his attorney in secret the apprehension of compelled disclosure by his attorney effectively deprives him of his right to representation by counsel at the trial. It deprives him of due process of law in violation of the United States Constitutional guaranty.

CONCLUSION

This case is of importance to citizens throughout the United States. This Court has frequently considered due process of law requirements in criminal proceedings. It has not previously considered the question as to whether the denial of the right of a client to consult in private with his attorney before trial or in the preparation of

documents that eventually lead to a trial in a civil case is a denial of the right to aid of counsel in the trial and a denial of a fair trial thereby depriving him of his property without due process of law.

We respectfully submit that the point here involved deserves the attention of this Court and that the petition for Writ of Certiorari be granted.

Respectfully submitted,

JOHN A. BERRY
JOHN E. CASSIDY
Attorneys for Petitioners

APPENDIX A

OPINION AND JUDGMENT OF TRIAL JUDGE

ALBERT PUCCI, *Judge*:

1. Plaintiffs allege performance on their part of an option contract, and pray for specific performance of the duty of the Defendants to convey certain real estate described in the complaint.

2. Defendants allege failure on the part of Plaintiffs to perform a condition of the contract, which failure precludes a decree for specific performance.

3. The issue made by the pleadings is the meaning of a clause in the contract which reads as follows: "The conveyance of above premises is conditioned upon conveyance of suitable exchange property to seller. Seller will sell only if suitable exchange property can not be acquired by purchaser."

4. Plaintiffs' reading of the clause is that Defendants were to locate "suitable exchange property", after which Plaintiffs would acquire it and then convey it to Defendants in exchange for a deed to the described property—at the same time proper adjustment in money consideration, if any, would be made.

5. Defendants' reading of the clause is the same except that they contend it was Plaintiffs' duty to locate and acquire "suitable exchange property."

6. Plaintiffs presented evidence tending to prove:

(a) That Defendants made a number of attempts to locate "suitable exchange property."

(b) That Defendants' former attorney had instructed Plaintiffs not to search for or attempt to locate "suitable exchange property" in order to avoid price inflation which might result if it were known that one or two large corporations were interested in exchange property. Plaintiffs admit they made no attempt to locate "suitable exchange property" and never acquired any.

Defendants admit their own search for "suitable exchange property, but deny any knowledge of any such instructions alleged to have been given to Plaintiffs by Defendants' former attorney; but urge that parole evidence to explain Plaintiffs' failure to acquire "suitable exchange property" is not admissible, and that the Plaintiff's failure to perform the condition means that they have failed to bring themselves within the law governing specific performance of contracts.

7. In 12 Am. Jur. Section 226, it is said: "In the absence of a statute the only duty of the Courts is to discover the meaning of a specific contract and to enforce it without a leaning in either direction when the parties stood on an equal footing and were free to do what they chose. The rules of interpretation are intended for persons of common understanding."

In Section 227, it is said: "It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; . . . this language must be sufficient when looked at in the light of such facts as the Court is entitled to consider, to sustain whatever effect is given to the instrument. Taking into consideration

this limitation, it may be said that the object of all rules of interpretation is to arrive at the intention of the parties as it is expressed in the contract."

8. The word "conditioned" needs no analysis. Its meaning is plain. The word "acquire" is defined in Webster's International Dictionary, Second Edition, as follows: "To gain by any means, usually by one's own exertions; to get as one's own; as, to acquire title, riches, knowledge. Syn. attain, procure, win, earn, secure."

And, in Webster's 7th New Collegiate Dictionary, as follows: "To come into possession of, often by some uncertain or unspecified means. To secure, obtain."

And in the American College Dictionary, as follows: "To come into possession of; get as one's own; to acquire property, a title, etc. To gain for oneself through one's actions or efforts; to acquire learning, a reputation, etc." A synonym is, "obtain, procure, secure, win, earn, attain, get."

9. Interpreting the meaning of this clause by applying these rules and the common meaning of the words in the clause as defined above, it appears that the word "acquire" has an affirmative thrust which requires action on the part of the persons to whom it refers, and in this case those persons were the Plaintiffs. Taking the clause as a whole, it thus appears that it was a condition of the contract that buyers (Plaintiffs) acquire "suitable exchange property" to exchange with Defendants for a deed to their property. The Plaintiffs give two explanations to support their interpretation of the clause: first, that the active part taken by Defendants in searching for "suitable exchange property" tends to prove that they, too, placed this interpretation upon the clause. There is nothing in the contract to

prohibit Defendants from searching as they did and this could not, without more, relieve Plaintiffs of their duty as expressed in the contract. Secondly, the testimony of the former attorney for the Defendants to the effect that Plaintiffs were instructed not to search for or attempt to locate "suitable exchange property." The question is what he said in the writing and not what his oral interpretation of it may have been.

I am of the opinion that the evidence concerning Defendants' search was immaterial and that the lawyer's interpretation is not admissible. The ordinary meaning of the clause taken as a whole is clear and does not require evidence outside the contract in its interpretation.

10. It follows that Plaintiffs have not shown by clear and satisfactory evidence that they have performed the contract on their part, or have at all times been ready, willing and able to perform; therefore, Count I of the complaint must be dismissed for want of equity.

On August 1, 1967, a judgment order will be entered. A copy of said order is enclosed.

APPENDIX B

OPINION AND JUDGMENT OF APPELLATE COURT

SCHEINEMAN, J.

The plaintiffs obtained an option to buy 370 acres of land from defendants at a fixed price of $330,000.00. The contract contained this provision:

"The conveyance of the above premises is conditioned upon conveyance of suitable exchange property to seller. Seller will sell only if such exchange property cannot be acquired by purchaser."

When the buyers exercised their option as provided in the contract, the sellers declined to close the deal. Plaintiffs then filed this suit in equity praying for specific performance. It was defended on the ground that plaintiffs had not performed their obligation to produce suitable exchange property. The chancellor denied the relief deciding for defendants on the ground principally that the words "acquired by purchaser" mean that the plaintiffs were obligated to acquire and tender suitable exchange property.

When an exchange is contemplated it is surely essential that the party tendering the exchange be able to convey, or cause to be conveyed, the title thereto. To this extent that party must acquire a right to convey. But, there arose a number of questions which cannot be answered by merely reading this paragraph. Who has the right to select the property to be exchanged? To whom must it be suitable? May the plaintiffs tender acreage which the defendants say is too far away or otherwise undesirable to them? May the plaintiffs claim credit on their contract for their costs even if defendants assert the price is too high?

Surely the parties must have had some understanding on these subjects when they contracted. Yet, the contract does not spell out what they intended, thus leaving both sides room to claim what they think was meant. With two possible answers to these and other questions, the written contract left matters open to dispute unless both sides dealt at all times in good faith.

The rest of the contract throws no light on these questions. The fact is the parties did not write a complete statement of their intentions. The option agreement is incomplete on its face as to various matters which have to be agreed upon. In this situation, evidence of prior negotiations is admissible.

"Whether the written contract was intended to be a complete and final agreement, must be determined from the language of the contract and the circumstances of the case. If it is silent in essential particulars, parole evidence is admissible to establish the missing parts." *Stevens* v. *Fanning,* 59 Ill. App.2d 285; *Olsen* v. *Rossetter,* 399 Ill. 232; *Meyer* v. *Sharp,* 341 Ill. App. 431, 435; *Fuchs & Lang Co.* v. *Kittredge & Co.,* 242 Ill. 88, 94.

"Parole evidence which does not vary or contradict the document under consideration is admissible to establish a fact as to which the instrument is silent." 18 ILP Evidence, Sec. 271.

"The intention of the parties, it is true, must govern; but the experience of human affairs teaches the courts that this intention is not to be sought merely on the apparent meaning of the language used, but this language may be enlarged or limited by reference to the circumstances surrounding the parties and the object they evidently had in view." *Pocius* v. *Halvorsen,* 30 Ill. 2d 73, 78.

In addition to the line of cases above referred to which permit evidence to be admitted as to prior and contemporaneous negotiations, where it is found that the written agreement is silent in some essential matters, there is another line of cases which refer to the acts of the parties as showing what they believe was intended. Some of these cases are as follows:

"In the construction of a contract it is always allowable to look to the interpretation the parties place upon it, contemporaneously or in its performance for aid in ascertaining its meaning." *Consolidated Coal Co.* v. *Schneider*, 163 Ill. 393, 396.

"Where the parties to a contract have approved a particular construction of doubtful terms or conditions of the contract, the court will follow the construction which the parties have placed upon it." *Abingdon Bank & Trust Co.* v. *Bulkeley*, 390 Ill. 582.

"There is no more convincing evidence of what the parties intended by their contract than to see what they did in carrying out its provisions." *Department of Revenue* v. *Jennison Wright Corp.*, 393 Ill. 401, 408.

"It is a familiar rule of construction, that where the terms of an agreement are in any respect doubtful or uncertain and the parties to it, have by their own conduct, placed a construction upon it which is reasonable, such construction will be adopted by the courts, in the event of litigation concerning it." *Wood River Drainage and Levee District* v. *Alton Box Board Co.*, 26 Ill. 2d 53; *Pocius* v. *Halvorsen*, 30 Ill. 2d 73, 81.

Applying these legal principles to the facts brought out by testimony in this case, we find that the attorney who was later retained by defendants, had drawn up this clause

concerning exchange property for the purpose of deferring large capital gains which would be heavily taxed. He owned land in this vicinity and sold an option on it to the plaintiffs and included therein this paragraph. He also used it for other clients. He had told representatives of the plaintiffs they should not attempt to find exchange property since that would simply drive the price up. When the defendants retained him in their transaction he informed them about the exchange clause, its purpose and that he had told the plaintiffs they were not to seek exchange property.

This option contract with the defendants was executed in February, 1965. Thereafter the defendants proceeded to look for property they would deem acceptable. They consulted numerous real estate brokers and inspected farms over a wide area.

There is no possible doubt under the evidence in this case that Mr. Byczynski knew he was to select property suitable to him for exchange purposes. He testified that in the course of his search he actually made offers for three different farms. His offers were rejected.

Months later in September of 1965 the plaintiffs notified defendants they were exercising the option. Thereafter, on September 16, 1965 Mr. Byczynski met with representatives of the plaintiffs. At that meeting he complained that he was not given enough time to locate exchange property and asked for an extension to March 1, 1966.

Since it is established without controversy that defendants were to select exchange property pursuant to their agreement and they acted upon that agreement in an effort to acquire it, it follows that the defense in this case, in which it is asserted that the plaintiffs were supposed to

seek out and procure exchange property, was contrary to the facts.

Accordingly the decree entered in this case is reversed and the cause is remanded with directions to enter a decree granting the relief prayed for.

Reversed and Remanded.

ALLOY, J., STOUDER, J. CONCUR

APPENDIX C

(SEAL)

STATE OF ILLINOIS
APPELLATE COURT THIRD DISTRICT

OTTAWA

Date July 16, 1968
General Case No. 67-95

The Court Has This Day Entered In The Case Of:
New York Central Development Co. vs. Byczynski

The Following Order:

Petition for rehearing and request for certificate of importance are denied.

J. Lindo Silver
J. Lindo Silver, Clerk

APPENDIX D

(SEAL)

State of Illinois
Office of
CLERK OF THE SUPREME COURT
Springfield

Clell L. Woods, Clerk

Telephone
Area Code 217
525-2035

September 23, 1968

Messrs. Berry & O'Conor
Attorneys at Law
422 Streator National Bank Bldg.
Streator, Illinois 61364

Gentlemen:

In Supreme Court today, in Case No. 41601 entitled:

The New York Central Development Corporation, a Delaware corporation, et al., etc.,

respondents

vs.

Edward J. Byczynski, et al.,
petitioners

Petition for Leave to Appeal was: DENIED

Very truly yours,

Clell L. Woods
Clerk of the Supreme Court

APPENDIX E

IN THE

Supreme Court of Illinois

THE NEW YORK CENTRAL DEVELOPMENT CORPORATION, a Delaware Corporation, and **JONES & LAUGHLIN STEEL CORPORATION,** a Pennsylvania Corporation,
Plaintiffs-Appellants-Respondents,

vs.

EDWARD J. BYCZYNSKI and **HELENA S. BYCZYNSKI,**
Defendants-Appellees-Petitioners.

Petition for Appeal as a Matter of Right from the Appellate Court of Illinois for the Third District. There Heard on Appeal From the Circuit Court of Putnam County, Illinois.

Honorable **Albert Pucci,** Judge Presiding.

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IN THE

Supreme Court of Illinois

THE NEW YORK CENTRAL DEVELOPMENT CORPORATION, a Delaware Corporation, and **JONES & LAUGHLIN STEEL CORPORATION,** a Pennsylvania Corporation,

Plaintiffs-Appellants-Respondents,

vs.

EDWARD J. BYCZYNSKI and **HELENA S. BYCZYNSKI,**

Defendants-Appellees-Petitioners.

Petition for Appeal as a Matter of Right from the Appellate Court of Illinois for the Third District. There Heard on Appeal From the Circuit Court of Putnam County, Illinois.

Honorable **Albert Pucci,** Judge Presiding.

Abstract of Record

Page of Record

C2 COMPLAINT FOR SPECIFIC PERFORMANCE AND OTHER RELIEF

COUNT I. (SEPARATE ACTION IN CHANCERY.)

As its Complaint against defendants, plaintiffs state:

1. At all times mentioned herein defendants were, and now are, the owners of the following-described real property:

TRACT I—The South Ten Acres of the West Half of the Northeast Quarter of Section 2, the North Half of the Southwest Quarter of Said Section 2, the Southeast Quarter of the Southwest Quarter of said Section 2, and the West Half of the Southeast

Quarter of said Section 2; also, the north 3/8's of the East Half of the Northwest Quarter of Section 11, and the North 3/8's of the West Half of the Northeast Quarter of Section 11, all in Township 32 North, Range 2 West of the Third Principal Meridian, containing 270 acres more or less, situated in Putnam County, Illinois;

TRACT II—Also, the East Half of the Northwest Quarter of Section 12, and the West Half of the Southwest Quarter of the Northwest Quarter of Section 12, all in Township 32 North, Range 2, West of the Third Principle Meridiar., situated in Putnam County, Illinois, containing 100 acres more or less;

C3 2. At all times mentioned herein The New York Central Development Corporation, a Delaware corporation, acted for and on behalf of Jones & Laughlin Steel Corporation, a Pennsylvania corporation.

3. On February 16, 1965, for $100, defendants granted to plaintiff, The New York Central Development Corporation, a Delaware corporation, an Option to purchase said real estate. A copy of said Option is attached hereto as Exhibit A and made a part hereof.

4. Pursuant to the terms of said Option, defendants were paid $33,000 and said Option was thereby extended to March 1, 1966.

5. Pursuant to said Option, on September 14, 1965, a notice was sent by certified mail to defendants exercising the Option to purchase said property.

6. Thereafter, plaintiff, The New York Central Development Corporation, notified defendants that plaintiff, The New York Central Development Corporation, was ready at all times to complete the purchase

of said property, and on November 15, 1965, at Hennepin, Illinois, plaintiff, The New York Central Development Corporation, duly tendered to defendants the sum of $297,000, being the balance of the purchase price and all other sums due under the terms of said Option and requested that defendants execute and deliver a deed for said property according to said Option; but defendants refused to receive said sum and refused to execute and deliver said deed and still so refuse.

7. Plaintiffs have been at all times and now are ready, willing and able to perform their part of said purchase and to pay to defendants the aforesaid sum of $297,000, and any other sums due under said Option.

C4 8. Plaintiffs have performed all the conditions on their part to be performed, but defendants maintain their refusal to perform their obligations under said Option.

COUNT II. (SEPARATE ACTION AT LAW.)

9. The purchase of said real property by plaintiffs is part of the acquisition of a large tract of property by plaintiffs of which said real property owned by defendants is an integral part. By reason of the defendants' refusal to perform plaintiffs have been and will be delayed in the assembly of said tract and the construction and use proposed for said entire tract and as a result thereof have and will suffer damages and, further, plaintiffs have been required to hire attorneys and undergo expenses.

WHEREFORE, plaintiffs pray judgment that defendants specifically perform their obligations under said

Option as exercised and execute and deliver to plaintiff, The New York Central Development Corporation, or its nominee, a good and sufficient Warranty Deed conveying said real property to plaintiff, The New York Central Development Corporation or its nominee and that defendants be enjoined and restrained from conveying or encumbering said real property in any way so as to defeat or hinder the rights of plaintiffs under said Option and that plaintiffs recover from defendants their damages in the amount of $150,000 and their costs expended herein and for such other relief as shall be just.

C6

EXHIBIT A.

OPTION TO PURCHASE REAL ESTATE

The undersigned EDWARD J. BYCZYNSKI and HELENA S. BYCZYNSKI, husband and wife, each in his and her own right and as spouse of the other, whose address is Hennepin, Illinois, hereafter known as "Seller" in consideration of $100.00, receipt acknowledged, does hereby give to The New York Central Development Corporation, or its nominee, hereafter known as "Purchaser", the option to purchase the following described real estate in Putnam County, Illinois:

TRACT I—The South Ten Acres of the West Half of the Northeast Quarter of Section 2, the North Half of the Southwest Quarter of said Section 2, the Southeast Quarter of the Southwest Quarter of said Section 2, and the West Half of the Southeast Quarter of said Section 2; Also, the North 3/8 of the East Half of the Northwest Quarter of Section 11, and the North 3/8 of the West Half of the Northeast Quarter of Section

11, all in Township 32 North, Range 2 West of the Third Principal Meridian, containing 270 acres more or less, situated in Putnam County, Illinois;

TRACT II—Also, the East Half of the Northwest Quarter of Section 12, and the West Half of the Southwest Quarter of the Northwest Quarter of Section 12, all in Township 32 North, Range 2 West of the Third Principal Meridian, situated in Putnam County, Illinois, containing 100 acres more or less;

Except the underlying coal and minerals together with the right to mine and remove same as may have heretofore been conveyed separate from the surface, and subject to existing easements of public and quasi-public utilities in, over and across said premises, and subject to existing easements of public highways over and across said premises.

The purchase price shall be $330,000.00, the exact area to be determined by survey. The following provisions shall govern:

1. The Purchaser may exercise this option on or before March 1, 1965, by giving written notice by United States mail addressed to the Seller at the above address. Upon payment of the sum of $33,000.00 to the Seller prior to March 1, 1965, this option shall be extended until March 1, 1966, and may be exercised in the same manner on or before that date. If this option is extended in this manner, said sum shall be applied as a part of the purchase price. Upon exercise of this option, the parties shall be bound by the following conditions:

A. Not less than thirty days nor more than sixty days after notice of exercise of this option, the Pur-

chaser shall pay the unpaid balance of the purchase price to Seller.

Purchaser shall also pay to seller value of any growing crops on premises described as Tract I when this option is exercised; the seller reserves any growing crops on the premises described as Tract II, at exercise of option together with the right to cultivate same and remove said crops at maturity from said premises.

B. On that date, hereafter called the "closing date", Seller shall convey merchantable title in fee simple to the premises by good and sufficient warranty deed, free and clear of all liens and encumbrances, except taxes and special assesments levied or assessed on said premises subsequent to the closing date. Real estate taxes shall be prorated as of the closing date.

C. On the closing date, the Seller shall furnish a complete merchantable abstract or merchantable title guarantee policy brought down to the date of exercise of this option. The conveyance of above premises is conditioned upon conveyance of suitable exchange property to seller. Seller will sell only if suitable exchange property cannot be acquired by purchaser.

2. Immediately upon receipt of notice of exercise of this option, the Seller shall serve notices of termination of leases on all tenants of said property, and hereby appoints Purchaser as his agent for such purpose.

3. If said premises and buildings thereon are damaged or destroyed or substantially changed between the date of this option and the closing date, the purchase price shall be decreased by the appraised cost

of repairing or replacing same, not to exceed amount of insurance carried by seller.

Seller reserves right to remove all buildings and house in whole or in part at any time within one hundred twenty (120) days after the closing date as hereinabove set forth, and also reserves the right to remove within said period any or all fixtures, electrical equipment or electrical lines in or on said premises or said buildings and reserves the right to remove all shrubs and trees on said premises within the period of sixty days hereunder.

4. As a part of this agreement, the Seller hereby gives to the Purchaser, and its agents, employees and assigns, the right to enter the above described real estate for the purpose of making surveys, borings, soil tests and such other engineering tests as Purchaser deems necessary. Purchaser shall pay any damages sustained by seller by reason thereof if this option is not exercised.

5. This instrument shall be binding upon the heirs, assigns, successors, and nominees of the parties.

Dated at Hennepin, State of Illinois, this 16th day of February, 1965.

WITNESSES:

JOHN E. SHAFFER,

EDWARD J. BYCZYNSKI,
HELENA S. BYCZYNSKI.

C15 ANSWER TO COMPLAINT.

Now comes the defendants, Edward J. Byczynski and Helena S. Byczynski, by Berry & O'Conor, Cassidy & Cassidy, and John J. Wosik, their attorneys, and for answer to the complaint of the plaintiffs, state:

1. They admit the allegations of paragraph one of the complaint.

2. In answer to paragraph two of the complaint, defendants state that they have no knowledge as to whether the New York Central Development Corporation was acting for and on behalf of Jones & Laughlin Steel Corporation. That they were not informed by any of the representatives of the New York Central Development Corporation during the negotiations for the option that they were acting or purported to act for Jones & Laughlin Steel Corporation.

3. Defendants admit the allegations of paragraph three of the complaint.

4. Defendants admit the allegations of paragraph four of the complaint.

5. In answer to paragraph five of the complaint, defendants admit that shortly after September 14, 1965, they received a notice purporting to exercise said
C16 option, but they do not admit the legal conclusion in said paragraph five that said letter was legally effective to exercise the option.

6. Defendants deny that the New York Central Development Corporation notified these defendants that the plaintiff, New York Central Development Corporation, was ready at all times to complete the purchase

of said property. Defendants deny that the New York Central Development Corporation tendered to these defendants the sum of $297,000.00 at Hennepin, Illinois, on November 15, 1965. They deny that there was any provision in said contract for the closing thereof at Hennepin, Illinois and they deny that they were at Hennepin, Illinois on said date. They deny that the sum of $297,000.00 was the balance of the purchase price under the terms of said option, but allege that said option called for the payment of $297,000.00 at the time of the delivery of a deed subsequent to the exercise of the option and payment of the value of the crops on the premises described as Tract I at the time of the exercise of said option, and that there were crops on said Tract I on September 14, 1965 and also on November 15, 1965 of a value of $21,000.00.

7. In answer to paragraph seven of the complaint, defendants deny that the sum of $297,000.00 is the correct amount to be paid according to the terms of said option, but allege that said option calls for the sum of $297,000.00 plus the value of the growing crops on the premises described as Tract I at the time of the exercise of the option.

8. Defendants deny that the plaintiffs have performed all of the conditions on their part to be performed, but allege that said option expressly provided as follows:

> "The conveyance of above premises is conditioned upon conveyance of suitable exchange property to seller. Seller will sell only if suitable exchange property cannot be acquired by purchaser."

Seller thereby agreed and was thereby obligated to find suitable exchange property for the purchaser.
C17 Seller did not find any suitable exchange property for the purchaser or did not make any reasonable attempt to find exchange property for the purchaser, although informed that the purchaser desired to have exchange property. This provision of the contract constituted a condition to be performed by plaintiffs, and they have wholly failed and refused to perform said condition. The failure on the part of the plaintiffs to perform said condition precludes them from obtaining any relief in this Court by way of specific performance or otherwise.

9. Defendants deny the allegations of paragraph nine of the complaint and they deny that insofar as the option between these defendants and the plaintiffs is concerned, it was a part of the acquisition of a large tract of property; but state that this option involved only the tract described in the complaint and these defendants had no contractual relationship with anyone other than the plaintiffs or involving any real estate other than that described in the complaint. Defendants deny that they have any contractual obligation to the plaintiffs with reference to the assembly of a tract of land not described in the complaint, or with any construction or use thereof proposed by the plaintiff. Defendants deny that the employment of attorneys or the incurring of other alleged expenses is any item for which plaintiffs would have a right to complain against these defendants.

Defendants deny that plaintiffs are entitled to any of the relief sought in the prayer for relief.

C19 REPLY.

As its Reply to the Answer filed herein by defendants, the plaintiffs state:

1. Plaintiffs deny that there were crops on the premises described in the Complaint as Tract I on September 14, 1965 and November 15, 1965 of a value of $21,000; plaintiffs further deny that defendants were the sole owners of the crops on said premises; plaintiffs state that prior to November 15, 1965 plaintiffs advised defendants through their attorney that plaintiffs were willing to pay an amount equal to the value of any growing crops on said premises at the time of exercise of the option against delivery at the closing of a bill of sale by defendants conveying title to such crops to plaintiffs and that defendants wholly failed to tender any bill of sale; plaintiffs at all times were ready, willing and able to pay an amount equal to the value of any such growing crops and at all times were ready, willing and able to fully perform the contract for the purchase of the premises described in the Complaint.

C20 2. Plaintiffs deny that under the provisions of the option and contract there was any obligation upon plaintiffs to find suitable exchange property for the defendants. Plaintiffs further state that it was the obligation of defendants to find property they deemed suitable for exchange under the provisions of the option and the contract, and defendants were so advised and plaintiffs were ready, willing and able at all times to arrange the purchase and exchange with defendants of any property which defendants would

state was suitable to them as exchange property. Plaintiffs further state that defendants looked for such exchange property but never advised plaintiffs that defendants had located any such property or that defendants were willing to accept any property as suitable for exchange.

WHEREFORE, plaintiffs pray for the relief asked for in the Complaint.

C27 MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT

* * * *

C30 4. On November 5, 1965, attorney John J. Wosik on behalf of these defendants answered said letter of October 29, to attorneys Sidley, Austin, Burgess & Smith, in which he expressly called attention to said attorneys, and through said attorneys to the plaintiffs, that the option here involved expressly makes the conveyance of the real estate involved conditional upon the conveyance of suitable exchange property to the sellers, and that the purchaser had made no offer to convey such suitable exchange property. A copy of this letter of November 5 is marked Exhibit D hereto attached and made a part hereof.

C48 ORDER (January 31, 1967).

In this proceeding upon appropriate notice plaintiffs commenced the taking of the deposition of Walter Durley Boyle in Hennepin on January 11, 1967. In the course of that deposition, plaintiffs questioned the deponent about, and sought to elicit testimony from him concerning matters discussed between deponent and representatives of plaintiffs and thereafter discussed between deponent and defendants herein while deponent represented defendants as attorney when

defendants negotiated and granted to plaintiffs the Option to purchase the property described in the complaint herein. Such matters concerned the meaning and effect of the provision drafted by deponent and inserted in the said Option relating to exchange property and the instructions given by deponent to representatives of plaintiffs and accepted by such representatives that plaintiffs were not to attempt to locate or negotiate for exchange property under the terms of said Option provision since any such attempt would involve a higher price for exchange property than to the individuals involved in the Option.

C49 The subject matter of such testimony sought to be elicited from said deponent is outlined in questions propounded at pp. 15-16-21-22 of the transcript of said deposition, which is incorporated herein by reference.

Attorneys for defendants herein objected to testimony concerning such matters on the ground that it involved a privileged communication between parties and their attorney and as such was privileged from disclosure.

The deposition was suspended and said objections and the claim by defendants that such matters involved a privileged communication were argued before this court at length.

The court having considered the argument of counsel and being fully advised finds that from the context of deponent's testimony as shown in the transcript said subject matter and the questions objected to by attorneys for defendants do not come within the ambit of confidential communications and are not privileged; and

Accordingly, it is hereby ordered that said objections to testimony concerning said subject matter and questions be and hereby are overruled and deponent is ordered to answer questions concerning such matters and to testify fully thereon.

ALBERT PUCCI,
Judge.

C50 AMENDMENT TO ANSWER TO COMPLAINT.

Now come the defendants, Edward J. Byczynski and Helena S. Byczynski, by Berry & O'Conor, Cassidy & Cassidy, and John J. Wosik, their attorneys, and leave of court being first had and obtained, hereby amend their Answer to the Complaint heretofore filed herein by striking therefrom paragraph eight (8) of said answer, and substituting in lieu thereof, the following paragraph eight (8):

8. Defendants deny that the plaintiffs have performed all of the conditions on their part to be performed, but allege that said option expressly provided as follows:

> "The conveyance of above premises is conditioned upon conveyance of suitable exchange property to seller. Seller will sell only if suitable exchange property cannot be acquired by purchaser."

Purchaser thereby agreed and was thereby obligated to find suitable exchange property for the seller. Purchaser did not find any suitable exchange property for the seller or did not make any reasonable attempt to find exchange property for the seller, although informed that the seller desired to have exchange prop-

erty. This provision of the contract constituted a condition to be performed by plaintiffs, and they have
C51 wholly failed and refused to perform said condition. The failure on the part of the plaintiffs to perform said condition precludes them from obtaining any relief in this Court by way of specific performance or otherwise.

C53 PLAINTIFFS' REPLY TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

* * * *

C56 Thereafter, it was not until Mr. Byczynski's attorney, John J. Wosik, wrote a letter dated November 5, 1965 and received by Mr. Gralen on or about November 8, 1965, that for the first time defendants made any claim that it was the obligation of plaintiffs to locate "suitable" exchange property.

C124 DEFENDANTS' REPLY TO PLAINTIFFS' ANSWER TO MOTION FOR SUMMARY JUDGMENT and DEFENDANTS' ANSWER TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

C128 These defendants were not informed that the New York Central Development Corporation representatives had discussed the matter with Attorney Walter Durley Boyle or the contract or form thereof. These defendants paid Attorney Walter Durley Boyle the sum of Fifty ($50.00) Dollars attorney's fees for preparing said option and the New York Central Development Corporation reimbursed these defendants for said expense of Fifty ($50.00) Dollars.

C135 AFFIDAVIT OF JOHN J. WOSIK, ATTACHED TO DEFENDANTS' ANSWER TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

"Within the next forty days [after Sept. 16, 1965], this affiant had at least three or four telephone conversations with Attorney Donald J. Gralen; * * * In these conversations when Mr. Gralen referred to the strict wording of the contract, this affiant then informed Mr. Gralen that according to the strict wording of the contract, the plaintiffs were obligated to find exchange property. This affiant put this statement in writing to plaintiffs' attorneys in his letter to them dated November 5, 1965, * * * "

C136 ORDER (April 18, 1967).

This matter coming on to be heard upon the Motions For Summary Judgment herein filed by the Plaintiffs and by the Defendants, and the respective Replies thereto, and the Court having heard argument by counsel for each side, and being fully advised,

The Court finds there are genuine issues of fact to be determined between the parties, and

Accordingly the Motions For Summary Judgment filed herein by each side are hereby denied and this matter is set for trial on April 26, 1967, at 10:00 A.M.

ALBERT PUCCI,

Judge.

C137 ADDED REPLY.

Pursuant to leave of Court granted when Defendants were given leave on April 26, 1967 to amend their answer previously filed herein by interlineation, Plaintiffs reply thereto as follows:

1. The option described in the Complaint provides for payment for growing crops, if any, on Tract I only at the time of payment of the unpaid balance of the purchase price which herein was $297,000.

2. Prior to November 15, 1965 the date set for closing, Plaintiffs notified Defendants that Plaintiffs would make any payment for any growing crops specified in the Option at the time of closing and Plaintiffs were ready, willing and able to so do with funds available for such purpose.

C138 MOTION FOR JUDGMENT (April 28, 1967).

Now come the defendants by their attorneys at the close of all the evidence for the plaintiffs and move the court to enter judgment for them and against the plaintiffs on Count I of the complaint for the reason that the evidence is insufficient in law to justify granting any relief to plaintiffs on Count I and defendants tender herewith a written judgment.

ORDER (April 28, 1967).

C138 Motion heard this day, April 28, 1967, and the same is hereby denied.

ALBERT PUCCI,
Judge.

C143 MOTION FOR JUDGMENT (May 2, 1967).

Now come the defendants by their attorneys at the close of all the evidence and move the Court to enter judgment for them and against the plaintiff on Count I of the Complaint for the reason that the evidence is insufficient in law to justify granting any relief to plaintiffs on Count I and defendants tender herewith a written judgment.

C144 MEMORANDUM (July 25, 1967).

1. Plaintiffs allege performance on their part of an option contract, and pray for specific performance of the duty of the Defendants to convey certain real estate described in the complaint.

2. Defendants allege failure on the part of Plaintiffs to perform a condition of the contract, which failure precludes a decree for specific performance.

3. The issue made by the pleadings is the meaning of a clause in the contract which reads as follows: "The conveyance of above premises is conditioned upon conveyance of suitable exchange property to seller. Seller will sell only if suitable exchange property can not be acquired by purchaser."

4. Plaintiffs' reading of the clause is that Defendants were to locate "suitable exchange property," after which Plaintiffs would acquire it and then convey it to Defendants in exchange for a deed to the described property—at the same time proper adjustment in money consideration, if any, would be made.

5. Defendants' reading of the clause is the same except that they contend it was Plaintiffs' duty to locate and acquire "suitable exchange property."

6. Plaintiffs presented evidence tending to prove:

C145 (a) That Defendants made a number of attempts to locate "suitable exchange property."

(b) That Defendants' former attorney had instructed Plaintiffs not to search for or to attempt to locate "suitable exchange property" in order to avoid price inflation which might result if it were known that one or two large corporations were interested in exchange property. Plaintiffs admit they made no attempt to locate "suitable exchange property" and never acquired any.

Defendants admit their own search for "suitable exchange property, but deny any knowledge of any such instructions alleged to have been given to Plaintiffs by Defendants' former attorney; but urge that parole evidence to explain Plaintiffs' failure to acquire "suitable exchange property" is not admissible, and that the Plaintiffs' failure to perform the condition means that they have failed to bring themselves within the law governing specific performance of contracts.

7. In 12 Am. Jur. Section 226, it is said: "In the absence of a statute the only duty of the Courts is to discover the meaning of a specific contract and to enforce it without a leaning in either direction when the parties stood on an equal footing and were free to do what they chose. The rules of interpretation are intended for persons of common understanding."

In Section 227, it is said: "It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; * * *

C146 this language must be sufficient when looked at in the light of such facts as the Court is entitled to consider, to sustain whatever effect is given to the instrument. Taking into consideration this limitation, it may be said that the object of all rules of interpretation is to arrive at the intention of the parties as it is expressed in the contract."

8. The word "conditioned" needs no analysis. Its meaning is plain. The word "acquire" is defined in Webster's International Dictionary, Second Edition, as follows: "To gain by any means, usually by one's own exertions; to get as one's own; as, to acquire title, riches, knowledge. Syn. attain, procure, win, earn, secure."

And, in Webster's 7th New Collegiate Dictionary, as follows: "To come into possession of, often by some uncertain or unspecified means. To secure, obtain."

And in the American College Dictionary, as follows: "To come into possession of; get as one's own; to acquire property, a title, etc. To gain for oneself through one's actions or efforts; to acquire learning, a reputation, etc." A synonym is, "obtain, procure, secure, win, earn, attain, get."

9. Interpreting the meaning of this clause by applying these rules and the common meaning of the words in the clause as defined above, it appears that the word "acquire" has an affirmative thrust which requires action on the part of the persons to whom it refers, and in this case those persons were the Plaintiffs. Taking the clause as a whole, it thus appears that it was a condition of the contract that buyers

(Plaintiffs) acquire "suitable exchange property" to exchange with Defendants for a deed to their property. The Plaintiffs give two explanations to support their interpretation of the clause: first, that the active part taken by Defendants in search for "suitable ex-
C147 change property" tends to prove that they, too, placed this interpretation upon the clause. There is nothing in the contract to prohibit Defendants from searching as they did and this could not, without more, relieve Plaintiffs of their duty as expressed in the contract. Secondly, the testimony of the former attorney for the Defendants to the effect that Plaintiffs were instructed not to search for or attempt to locate "suitable exchange property." The question is what he said in the writing and not what his oral interpretation of it may have been.

I am of the opinion that the evidence concerning Defendants' search was immaterial and that the lawyer's interpretation is not admissible. The ordinary meaning of the clause taken as a whole is clear and does not require evidence outside the contract in its interpretation.

10. It follows that Plaintiffs have not shown by clear and satisfactory evidence that they have performed the contract on their part, or have at all times been ready, willing and able to perform; therefore, Count I of the complaint must be dismissed for want of equity.

On August 1, 1967, a judgment order will be entered. A copy of said order is enforced.

ALBERT PUCCI,

Judge.

C148 JUDGMENT (Aug. 1, 1967).

It is hereby ordered, adjudged and decreed that Count I of the complaint is dismissed for want of equity with prejudice and that defendants do have and recover judgment against the plaintiffs for their costs and that execution issue therefor.

ALBERT PUCCI,
Judge.

MOTION TO VACATE JUDGMENT AND FOR REHEARING (Aug. 22, 1967)

Pursuant to § 68.3 of the Illinois Civil Practice Act, plaintiffs move the court to vacate the Order and Judgment entered herein in favor of defendants on August 1, 1967, and for rehearing or reconsideration
C149 of this matter for the following reasons:

1. *All* of the evidence and the testimony presented to the court in this proceeding supports the position of the plaintiffs that plaintiffs were not intended, and had no obligation, to search for and locate "suitable exchange property." *All* of the evidence shows without doubt that this was the interpretation placed upon the contract by the parties themselves. The law in Illinois is that the interpretation of the parties to a contract can *always* be shown and considered by the court.

2. Ruling on this matter was delayed to permit the official court reporter to write up the transcript and for the parties to file briefs. Only a portion of the transcript was available to the court and to counsel when the Order and Judgment in question was entered. The remainder of the testimony which can be available to the court and counsel within a reasonable

time shows the clear interpretation of the parties and the intent of the parties to indicate that plaintiffs are entitled to specific performance.

C150 WHEREFORE, plaintiffs move the Court:

A. To vacate the Order and judgment heretofore entered in favor of defendants and enter judgment for plaintiffs; or

B. Grant plaintiffs a rehearing or retrial of this cause upon which the Court will grant the relief sought C150 by plaintiffs in their Complaint and enter judgment thereon in behalf of plaintiffs; or

C. Allow Counsel for plaintiffs an opportunity to argue this Motion before the Court after which the Court will vacate its Order heretofore entered and enter judgment for plaintiffs.

ORDER (Sept. 5, 1967)

This matter is before the Court on the motion of the Plaintiffs, The New York Central Development Corporation and Jones and Laughlin Steel Corporation to vacate judgment for the Defendants and rehearing filed Aug. 22, 1967. All parties were present through their respective counsel.

C151 The Court having heard the arguments of counsel finds that the Motion to vacate the Judgment and for Rehearing should be denied.

IT IS ORDERED AND ADJUDGED that the Motion of Plaintiffs to vacate the Judgment heretofore entered August 1, 1967 and for rehearing should be and is hereby denied.

IT IS ORDERED that the amount of an Appeal Bond to serve as a supersedeas shall be $1,000.00 without sureties.

C152-153 Notice of Appeal filed September 22, 1967.

C154-155 Notice of Presentment of Supersedeas Appeal Bond and Proof of Service filed on September 26, 1967.

C156-165 Notice of Filing Notice of Appeal, Proof of Service of Notice of Appeal, Supersedeas Appeal Bond, Motion for Approval of Appeal Bond, and Order Approving Bond filed and entered September 26, 1967.

C166-168 Praecipe of Record filed October 5, 1967.

C169-170 Notice and Proof of Service of Complete Transcript of Record filed October 11, 1967.

TRANSCRIPT OF PROCEEDINGS

HELENA BYCZYNSKI, being first duly sworn, testified as a witness on behalf of the Plaintiffs under the provisions of Section 60 of the Civil Practice Act as follows:

Cross Examination Under Section 60.

34 I signed the option given to the plaintiffs, which is Plaintiffs' Exhibit 1.

39 The option had been given to my husband and me. We studied it over and figured out what it meant and talked about it and then went and talked to our lawyer, Walter Durley Boyle.

40 We talked to Mr. Boyle before we signed the option. I don't remember now what was said in that conversation.

43 Forty or fifty real estate people came to our home and talked to us about farm land they had for sale.

44 Mr. Royce was one of them and Mr. Turner from Princeton was another.

46 There was quite a swarm of real estate people that came out to see us. I suppose our neighbors that were getting exchange property sent them over to see us.

47 My husband and I talked about exchange property among ourselves.

48 My husband and I looked at some farm properties.

49 We drove around through the country.

55 I signed the earlier option to the plaintiffs to purchase real estate dated November 19, 1964, which is Plaintiffs' Exhibit 4.

56 The price on the first option was changed from $298,400 to $330,000 on the second option. My husband took care of that.

Direct Examination.

61 We signed Plaintiffs' Exhibit 1, the option, in Mr. Boyle's office on the date it bears.

Recross Examination.

66 My husband and I and Mr. Boyle were in Mr. Boyle's office when we signed the option contract. Mr. Boyle's secretary was there, but I don't know if she was in there when we signed. I don't know how long we were in with Mr. Boyle.

67 We had more real estate people come out to see us when other people around us were selling their property. The real estate people knew this thing was coming and they went around to everybody.

HAROLD MORINE, JR., being first duly sworn, testified as a witness on behalf of the Plaintiffs as follows:

Direct Examination.

69 I live in Princeton, Illinois. I am the District Manager of The Farm Loan Division of The Mutual Benefit Life Insurance Company. I am the farm loan man for the company. I appraise farms for mortgage loans. I have done this for 20 years. I am a graduate of the University of Illinois with a B.S. degree and a Master's degree from Purdue University.

70-71 Late in September, 1965, Mr. Byczynski contacted me and told me that "he was selling his property in Hennepin to the New York Central Development Corporation and Jones & Laughlin and that he was looking for other farm property."

71 I told him that I was not a real estate broker or a salesman but that I could refer him to sales people, and if he wanted me to look at farms with him, I could advise him as to whether the farms were priced in line and I would spend some time with him.

72 A few days later Mr. Byczynski picked me up and told me he had various farms that he looked at and would like to have me look at them with him. We went to a farm near Brookville, Illinois, which Mr. Byczynski had seen previously.

73 I made several borings with a soil auger.

74 We spent an hour and a half or two hours on the property and looked at the out buildings. I told Mr. Byczynski that I thought the price as quoted was reasonable.

75 The price was in the area of $450 to $475 an acre.

76 We drove around two other farms which were two to four miles south and west.

77 We then drove to a farm in Whiteside County on Illinois Route 2, located on the Rock River, which is about 18 miles southwest of Sterling, Illinois.

78 We also looked at another farm on the west edge of Lyndon, Illinois, and made one or two soil borings.

78-79 We then went to Prophetstown, Illinois, and stopped at the Plautz Real Estate Office. Curtis Plautz took us to a farm south and west of Prophetstown where we looked at the buildings and made one or two soil borings.

82 Ten days or two weeks later I again went out with Mr. Byczynski, and we looked at a farm near Annawan, Illinois, which was about 300 acres. We looked at the buildings and I took soil borings.

Cross Examination.

83 I was acquainted with Mr. Byczynski but not intimate with him. Prior to September 1965, we had not ever discussed farm land.

84 It was in the last half of September that I went out with him.

86 I understood that Mr. Byczynski had given an option to Jones & Laughlin for his farm when he came to see me.

92 *Direct Examination.*

WALTER DURLEY BOYLE, being first duly sworn, testified as a witness on behalf of the Plaintiffs as follows:

I am here in response to a subpoena. I have known Mr. and Mrs. Byczynski for over 30 years.

93 I have done different legal work for each of them during that period of time.

I prepared Plaintiffs' Exhibit 1 and also the earlier option which is Plaintiffs' Exhibit 4 for Mr. and Mrs. Byczynski. I represented Mr. and Mrs. Byczynski in connection with the granting of these options for the sale of their real estate.

93-94 I talked to Mr. Byczynski a few days before November 19, 1964, which is the date of the first option, and I talked to Mrs. Byczynski when she came to my office when that first option was executed.

94 Mr. Byczynski came in and said he was going to option some land.

94-95 There is a clause in both option contracts (Plaintiffs' Exhibit 1 and Plaintiffs' Exhibit 4) inserted by typewriting which reads "The conveyance of above premises is conditioned upon conveyance of suitable exchange property to seller. Seller will sell only if suitable exchange property cannot be acquired by purchaser." I drafted the language for these clauses.

95-96 When Mr. Byczynski came in to talk to me about the option contract, I had a discussion with him concerning an exchange property provision. I inserted this language in his option one or two days before the date it was executed on November 19, 1964. I had used this same language on earlier occasions for other

clients than Mr. Byczynski. I drafted this particular language which I used in the Byczynski option when the first person who wanted an exchange provision in this option came in and talked to me, which I suppose was in the first part of November, 1964.

97 Q. At any time, Mr. Boyle, did you discuss this provision with any representatives of the New York Central Development Corporation?

A. I discussed a provision concerning exchange property with Mr. Sam Hellenbrand, and I believe also Mr. Shaffer and Mr. Tighe, in the early part of November, 1964.

Q. In that conversation, Mr. Boyle, what, if anything, was said, either by yourself or these other two gentlemen, about the method of locating exchange property?

Objection by defendants' attorneys that the conversation is not binding on these defendants and is immaterial and that it is prior to the time Boyle represented Mr. Byczynski.

Objection overruled by the Court.

A. Well, I stated that the method to be used was
98 one where the property owner would locate the exchange property, and not the representative of the railroad, for the reason that we did not wish to have the representative of the railroad interested in any way with the location of the exchange property.

Objection and motion to strike out the answer by defendants' attorneys on the further ground that the answer is an attempt to vary and alter the terms of a written contract by parol evidence. It is a conversation out of the presence of defendants in which they did not participate and a conversation that occurred before they had employed Mr. Boyle.

99 Objection overruled by the Court.

100 Q. Mr. Boyle, what, if anything, else was stated in your conversation with the representative of the railroad or the New York Central Development Corporation that you told us about?

Defendants' attorneys made the same objections to this.

Objection overruled by the Court.

A. Well, in the first place I raised the question of taxes with the representative and that was how the conversation started. Also, I raised certain points concerning the option that they wished to make and then particularly I raised the question of taxes, and by taxes I mean income taxes, capital gains taxes. I
101 pointed out that I thought any clients that might come in to me concerning this matter would not sell for anything less than a substantial value and there would be capital gains to be considered, and therefore the question of installment payments was brought up and also the question of exchange property to be inserted in the option, and I insisted, so far as I was concerned, these would have to be in the option, and the railroad in the case of the exchange was to have no part in it, and that was the reason that we wanted the railroad representative to be out of it, so that the price would not be raised on exchange property that my clients might be seeking to select. They then agreed to those propositions, that I might have those propositions in such options as I would draw for any of my clients involved and I was to be allowed to draw the options with such insertions in their options as was necessary to show that it was an original intention of the parties to have an exchange.

The Witness (continuing): I participated in one of the option contracts together with other members of my family.

102 Q. Mr. Boyle, in your conversation that you mentioned to us, a day or two before November 19, 1964, with Mr. Byczynski in your office, what, if anything, was said concerning the manner in which the exchange property provision that you inserted in his option contract was to be handled?

Objection by defendants' attorneys on the ground that at this time the relationship of attorney and client existed between Mr. Boyle and the Byczynskis and it is a privileged communication. It is an attempt to vary and alter a written instrument by parol evidence and all prior discussions were merged in the written instrument.

The Court: With respect to the confidential relationship, I will overrule the objection subject to the
103 requirement that Mr. Kissel will connect this to prior testimony on this subject, as to other matters, the objection is overruled. He may answer.

Mr. Berry: I want to make a statement in the record that the clients are not releasing Mr. Boyle to make any statement. They are insisting on the privilege.

The Witness (continuing): This was a day or two before November 19, 1964. It was the second or third time he came in concerning this. Mr. Byczynski and I were present.

104 At that time the option contract was not completed, but the exchange provision had been inserted in the option contract. The amount in the option

contract had been left blank, because it was not completed with his negotiations. At that time, I told him that under the exchange provision he would be able to locate similar property, real property, and postpone the payment of capital gains taxes on his transaction with the New York Central Development Corporation. I told him that he would be able to locate this property himself, without any interference from the Development Corporation, that he would have a reasonable time after the execution or completion of the option to locate the property.

Motion by defendants' attorneys to strike the entire answer on the grounds previously raised.

The Court: Overruled.

Q. Mr. Boyle, what, if anything, did you say to Mr. Byczynski about your earlier discussion with the New York Central Development representatives about locating property?

105 Defendants' attorneys raised same objections to this question as to the other questions.

The Court: Overruled.

A. I told them I had worked it out with the representative of the railroad, that that would be the way it would be handled.

Motion by defendants' attorneys to strike the answer on the same grounds.

The Court: Denied.

106 On November 19, 1964, Mr. and Mrs. Byczynski came to my office and signed the first option contract.

108 They told me to insert the figure of $298,400 in the option. I told them that they could use this figure as an exchange for other lands which they could go out and purchase without any interference from anybody, and that thereby the capital gains tax and income tax would be postponed insofar as their exchange was concerned.

I prepared the second option dated February 16, 1965 (Plaintiffs' Exhibit 1), which contains the same identical language concerning the exchange provision.

Cross Examination.

111 My testimony as to dates is to the best of my recollection, and an examination of the exhibits here evidences the date.

Mr. Byczynski talked to me three or four or five days before November 19, 1964.

112 Ernest Bassi of our bank brought the representatives of the New York Central Development Corporation to my office in the latter part of October, 1964. That was the first time I heard anything about this matter. They said they were interested in acquiring property north of Hennepin and that someone had told them that I represented a number of people in the area and that I was interested as an owner of land in the area.

114-115 They showed me a form of option which was different from Plaintiffs' Exhibit 1. I told them that I would not be interested in signing that form of option or recommending it to any of my clients.

115 They next came to see me in early November, 1964, which was before any of the land owners came to see me.

116 At this time they brought in another form of option contract, and I talked to them about taxes and the exchange provision.

117 I represented myself. I have never represented the New York Central Development Corporation.

118 The next time I saw them, one of their representatives brought an option form in connection with my own land.

118-119 I had objected to some things in their original form, and these changes had been made.

119 I drafted the exchange property provision the first time one of my clients came in to talk to me about it. Except for the rider and the typewritten insertion for the exchange property clause, the form used was the one prepared by the New York Central Development Corporation.

120 I drafted the exchange property clause before Mr. or Mrs. Byczynski came in to see me.

122 If any particular client wanted it, then it was agreeable that either an installment payment provision or the exchange property provision would be put into the option contract.

124 As far as I know, my various clients were paid the amount shown in their option. I do not know that the New York Central reimbursed each of these various clients for the amount of my fee.

124 I gave Mr. Byczynski a bill, and he paid it quite a while later.

126 Mr. Byczynski came in to see me several times before November 19, 1964. A day or two before that date he picked up the option as I had it prepared, except

for the amount to be inserted, and took a copy of it home to study. I discussed the terms of the option, and particularly the tax aspect, each time that he came in to see me.

Q. On each of these occasions [referring to the discussions between Mr. Boyle and Mr. Byczynski concerning the option contract] were you and Mr. Byczynski the only ones present at the time of the discussion?

A. Yes.

Q. On each of these occasions you understood you were discussing this matter as his attorney?

A. Yes.

Q. You understood you were talking with Mr. and Mrs. Byczynski on November 19 as their attorney?

A. Oh, definitely.

127 I drafted the exchange property clause for my first client, and then I used the exact same language in Mr. Byczynski's option when he came in and after he had told me he wanted to have the exchange provision after I had explained everything to him.

128 The exchange property clause was in my option contract just as it is in this one. The railroad paid me $100 for my option.

Recross Examination.

132 After I drafted this exchange clause, no one from the railroad made any suggestions as to any revisions.

HAROLD C. PLAUTZ, being first duly sworn, testified as a witness on behalf of the Plaintiffs as follows:

Direct Examination.

134 I have been a real estate broker and auctioneer in Prophetstown, Illinois, since 1946. I am here today pursuant to a subpoena.

I first met Edward J. Byczynski in September, 1965.

136 Mr. Byczynski came to my office and told me he was interested in real estate around Prophetstown. He said the Jones & Laughlin Company was purchasing his property in Putnam and they would be the ones that would purchase a farm and then they in turn would trade him for his farm in order to avoid the tax.

He was interested in a farm in Carroll County.

137 This farm was operated by Raynor Mosher. He went up and looked at it with my son at some other times, and we made a sales agreement when he was to pay $475 an acre for the 460-acre farm.

138 I told Mr. Byczynski that I owned half of this farm, and Raynor Mosher owned the other half. I said I would have a contract drawn up and Raynor Mosher would sign it. The following morning I was going to meet Mr. Byczynski and we were going to go to the attorney and have this completed, but the negotiations then fell through.

Cross Examination.

139 He had looked at the farm with my son at another time. I only met him the one day.

142 It was in September 1965 that he explained to me why he wanted to find a property for sale.

145 Mr. Byczynski wanted the property, but my partner refused to sell.

146 I remember his statement about capital gains taxes so clearly because I had two other clients that told me the same thing, and then Mr. Byczynski. I felt he was dealing with the same corporation, and he told me the same thing the other fellows had told me.

149 Edward J. Byczynski, being first duly sworn, testified as a witness on behalf of the Plaintiffs under the provisions of Section 60 of the Civil Practice Act as follows:

Cross Examination Under Section 60.

I am one of the defendants in this lawsuit. I signed the two option contracts given to the plaintiffs which are admitted into evidence as Plaintiffs' Exhibit 1 and Plaintiffs' Exhibit 4.

150 The handwritten letter dated April 30, 1965, admitted into evidence as Plaintiffs' Exhibit 5 is my letter. I wrote it and my wife recopied it for me.

154 Plaintiffs' Exhibit 6 is a letter dated July 9, 1965, which I received in reply to my letter dated April 30, 1965.

155 In my letter dated April 30, 1965, to the plaintiffs, I told them that I wanted to go out and look for exchange property, and I did go out and look for exchange property, but for tax purposes only. These were my tax purposes.

155-156 Before I went and talked to Mr. Boyle, I did not understand all the ramifications of the tax laws and how exchange property could help me. Mr. Boyle explained how an exchange property provision could benefit me, and he explained how it would work. He explained how the clause in the contract would work.

156 In September 1965, I first went out and started to look for exchange property for tax purposes to benefit myself.

157 On September 16, 1965, John J. Wosik was my attorney. I recall a meeting in his office on September 16, 1965, at which meeting Mr. Gralen was present.

160 I recall looking for exchange property for tax purposes in Carroll County. My wife went with me the first time. My tenant, Louis Colby, went with me another time.

162 With Colby, we stopped the car and looked at property. We drove into two farms, one of which was owned by Raynor Mosher. I looked at his farm about three times, and made him an offer.

163 This farm was 460 acres with good buildings.

164 I discussed this farm with Harold Morine.

165 I also looked at that farm with Mr. Plautz.

167 The first day I went out with Mr. Morine, we spent most of the day driving around the country and looking at properties.

I also looked for exchange property with Roy Taylor. We looked at about 3 specific properties.

168 Roy Turner is a real estate man from Princeton. He is one of the 40 or 50 real estate men that my wife mentioned.

168-169 Mr. Plautz is a real estate man from Prophetstown. I looked at two or three farms with him. I went to him because he had an ad in the paper. He could have been one of the 40 or 50 real estate men that came to my house.

170 I told Mr. Plautz that I was looking for exchange property and that if I located exchange property, Jones & Laughlin would buy it for my tax purposes.

171 I also looked at the same properties with Mr. Plautz' son and with a real estate man named Royce from Galva, Illinois. Mr. Royce was one of the 40 or 50 real estate men who came out to the farm. He had heard I was looking for exchange property.

172-173 The 40 or 50 real estate people started coming out to my farm and talking about exchange property in September and October of 1965, after the option had been exercised by the New York Central. Every one of them talked about some kind of exchange property to offer to me.

174 I don't know whether I saw Mr. Royce in Galva more than three times or not.

175 He showed us about three farms. We stopped and looked them over.

175-176 I made an offer on a farm in Bureau County. This offer was in writing and was about $500 per acre.

177 This was farm land for exchange purposes.

I also talked to a real estate lady named Mrs. Matison in Earlville, Illinois. I talked to another real estate lady from Hennepin named Mrs. Clausen.

179 We went up to Rock Falls and talked to a real estate man named Ambrose Hermes about three times.

180 I drove around two farms with him.

180-181 Besides Turner and Royce and Plautz and Hermes and Mrs. Clausen and Mrs. Matison, there might have been more real estate people that I went to for exchange property in the fall of 1965, but I do not recollect.

I had a dispute with the New York Central people and told them I didn't want them coming on my property.

182 There might have been more than one such instance.

In addition to the two offers to purchase exchange property, the one on the Mosher farm and the one through Royce, I made one other offer.

183 This was through Roy Turner.

183-184 I received a letter from the plaintiffs dated September 14, 1965 (Plaintiffs' Exhibit 3) which said that the option includes a provision that I could trade my land for other suitable property of my choice if such suitable property is available, and it is important that I proceed promptly to select a property meeting my needs if I intend to make such a trade, however I never notified the New York Central or Jones & Laughlin that I had selected any such property as mentioned in that letter.

185 I did select property that I was willing to take in exchange for my property, but I never notified Jones & Laughlin of such property.

186 I never told the New York Central what kind of exchange property I would like. I never told them what price I would like to pay for exchange property. I never told them what location I wanted for exchange property.

Direct Examination.

187 In connection with the option, I met with Mr. Boyle in his office about four times before November, 1964, when the first option was signed (Plaintiffs' Exhibit 4).

189 Mr. Boyle told me the exchange clause was put in there for tax purposes.

190-191 I selected suitable property for exchange, but my offers were rejected.

196-197 *Recross Examination.*

The first option was dated November 19, 1964, and the second option was dated February 16, 1965. The first option was torn up and the second option was signed.

198 A dispute arose between myself and Jones & Laughlin over the first option because the words "per acre" had not been stricken in one place.

198-199 I never told Jones & Laughlin or the New York Central that I was going to make offers for exchange property, and I never told them that the offers were rejected.

DONALD J. GRALEN, being first duly sworn, testified as a witness on behalf of the Plaintiffs as follows:

Direct Examinatio .

208 I am an attorney and a member of the law firm of Sidley & Austin.

209 I represented the plaintiffs in connection with the option they have with Mr. and Mrs. Byczynski since January, 1965. The first time I met Mr. Byczynski was on September 16, 1965, in Mr. Wosik's office in Henry, Illinois.

210 On September 14, 1965, I mailed to Mr. and Mrs. Byczynski the document entitled "Exercise of Option," dated September 14, 1965 (Plaintiffs' Exhibit 2) and

a letter from the New York Central, dated September 14, 1965, addressed to Mr. and Mrs. Byczynski (Plaintiffs' Exhibit 3).

210 At the meeting on September 16, 1965, there were present Mr. Wosik, Mr. Byczynski, Mr. Tighe, of the New York Central Development Corporation, and myself.

212 I called Mr. Wosik to have a meeting about the option.

213 At this meeting, Mr. Byczynski stated that 60 days was not enough time for him to locate exchange property, and he wanted an extension of time to March 1, 1966 to close the transaction.

214-215 I told Mr. Byczynski and Mr. Wosik that while I could not commit the company, his request for an extension of time seemed reasonable to me and we could maybe work out an extension that I would recommend to my clients.

216-217 The time fixed for closing the deal was November 15, 1965, at Hennepin.

223 I was in Hennepin on November 15, 1965, to close the transaction with Mr. and Mrs. Byczynski. Frank Tighe, an officer of the New York Central Development Corporation was with me.

227-228 The defendants did not appear for closing.

228 I called Mr. Wosik at his office at Henry and told him that I was in Hennepin prepared to close the transaction, and he said that his clients would not be present.

Cross-Examination.

230 I went to Hennepin, Illinois, to Mr. Wosik's office on September 16, 1965, as a result of a 'phone conversation with Mr. Wosik.

231 I went to determine what problems there were on their side in connection with this option.

232 I was interested in solving any problems that the discussions would disclose. I was interested in closing the deal.

232-233 I had no specific authority from my clients to do anything with respect to the option agreement other than determine what problems there were, if any.

237 Mr. Tighe accompanied me to render any assistance he could because of his familiarity with the Byczynskis and with the transaction in general.

239 Mr. Byczynski's request that he be given additional time within which to locate exchange property sounded like a reasonable request to me provided that my client did not require the land immediately. If they didn't need the land immediately, I would recommend that to my clients.

DISCUSSION WITH THE COURT.

239-240 Mr. Cassidy: I think there has been sufficient testimony on cross-examination to establish that the witness was there for the purpose of compromising and settling some problems. This was after the option had been exercised and the plaintiffs were in possession of a contract for the sale of the property. The witness went to Henry, Illinois, to the defendants' lawyer and met with him. In the sense his testimony is such that his real purpose in going was to confirm their problems and settle them or make a recommendation of

settlement, if possible, I therefore move that his testimony on direct examination as to the statements of the defendant on that occasion be stricken.

Mr. Kissel: It is the position of the plaintiffs that
241 in any real estate transaction certain items are bound to come up that require discussion and perhaps clarification when the mechanics of closing the deal are being worked out. The testimony that we have here is that on September 14, 1965, a notice was sent exercising the option. There was a provision for closing within 60 days thereafter, so that at that time both parties knew that within a relatively short time this matter was to be closed. The parties got together, and in that meeting there was merely a discussion of the problems that were involved. There were certain requests made by Mr. Byczynski, just as there may be similar requests for some leniency in any real estate deal. You can't spell everything out in a contract, and some things have to be worked out. This is customary. If this were a personal injury claim and before trial, one party said, "I will offer you $10,000," that would be settlement talk and would be inadmissible in the trial of the case.

However, this was merely talk concerning the mechanics of closing. Mr. Byczynski said he needed more time to locate exchange property—sixty days was too short. That is not settlement talk such as you have in a personal injury case.

246 If nothing else, the statement by Mr. Byczynski that 60 days was too short for him to locate exchange property, and he needed more time was an admission of fact. And if nothing else, that particular portion of the testimony is admissible.

246 The Court: I don't think the defendants would have any objection to that portion.

247 I don't think there is any objection to the particular thing you have mentioned.

247 Motion to strike the testimony of the witness Gralen is allowed and Plaintiffs' Exhibit 7 which was admitted is stricken.

247 I don't think it is true to say that all statements made in such meetings are incompetent. For instance, the question as to whose was the duty to locate exchange property . . .

248 This seems to me to be an independent matter because there could well be a discussion on that matter without any dispute of liability, and all perfectly natural that someone might make a contract and ask for more time.

Direct Examination of Donald J. Gralen Resumed.

254-255 The option contract (Plaintiffs' Exhibit 1) calls for the seller to furnish a complete merchantable abstract or merchantable guaranty policy. Mr. and Mrs. Byczynski never delivered an abstract or title guaranty policy to either myself or to the plaintiffs.

Q. "Would you tell us what, if anything, was said
255 in that meeting in reference to a closing date for this sale of the property by Mr. and Mrs. Byczynski to the plaintiffs?"

Mr. Cassidy: That is objected to for the reason this meeting was called for the purpose of solving disputes and to accomplish a compromise and admissions of this testimony is incompetent.

256 The Court: "Sustain the objection. In spite of seeming inconsistency with the statement of the Court, my plan today is to be as correct as I can. Probably, Mr. Kissel, you are entitled to know it. If the liability is in question for this particular term of the option, the date of closing, in fact all matters already in the record showing when this option was exercised and the date which was set for the closing, the interval this might fill, for probative value all other testimony as to the duty or lack thereof, a date to locate property, the time element, is so intertwined with that, it seems to me that the Court cannot separate it in his mind. Objection sustained."

257-258 Mr. Kissel: Let me make an offer of proof. If this witness were permitted to testify, I represent to the Court that he would state that in the meeting of September 16, 1965, Edward Byczynski, one of the defendants herein, stated that 60 days was too short a period of time for him to go out and locate exchange property and that he needed more time to do that and he requested from the plaintiffs an extension of time to enable him to locate exchange property.

258 The Court: The offer is refused.

260 Q. Directing your attention to the last telephone talk with Mr. Wosik in October, 1965, will you tell me what, if anything, was said on that occasion?

260 Mr. Cassidy: I object to that as incompetent and immaterial, an admission of counsel not binding on the parties, and furthermore it would be hearsay.

260 The Court: What does it go to, Mr. Kissel, and what are you offering it for?

Mr. Kissel: I merely wish to show that a date had been fixed between the parties through their respective counsel for the closing of this real estate transaction.

261 Mr. Cassidy: I just want to suggest that the pleadings do show that the defendants were unwilling to close this transaction and that the real issue here is the exercise of the option and not the closing and this testimony about the closing is pretty much immaterial due to the fact that the pleadings make no issue of it.

Mr. Kissel: In view of the position of the attorneys for the defendants that there is no issue concerning the question of closing what occurred at that time or what was purported to occur, I will withdraw that question.

261-262 I was in Hennepin on November 15, 1965, to close the real estate transaction with the Byczynskis. We were there at ten o'clock in the morning and stayed most of the day at the court house. The Byczynskis did not appear. I called Mr. Wosik, and he said the Byczynski were not prepared to close that day.

RAYNOR MOSHER, being first duly sworn, testified as a witness on behalf of the Plaintiffs as follows:

Direct Examination.

267 I have been a farmer in Carroll County for 27 years. My farm is 460 acres.

268 In the fall of 1965, I saw Mr. and Mrs. Byczynski once and Mr. Byczynski three other times. Mr. Byczynski came to my farm the first time in September, 1965, with Curtis Plautz. He is Harold Plautz' son. Harold Plautz owned a half interest in my farm.

269 I talked to Mr. Byczynski again in the fore part or middle of October, 1965. It was down in the field on my farm. He had his tenant with him. He talked about buying the farm and said he had to purchase a farm.

270 He said he was going to sell his farm to a steel company, and he had to purchase another one. He said for income tax he had to purchase one and trade it for one for an income tax purpose.

270-271 I saw him again at the farm in the fore part of November, 1965. He agreed to purchase the farm from us on that date for $475 an acre. He came with Mr. Plautz, and he wanted to know what all went with the farm, and we went over all that and I said I would have to talk to my lawyer before I would sell.

We talked about the farm, and he said he wanted to make sure that he got the farm before he called the company that was going to buy it.

I said I had to see my lawyer first, and I went and seen my lawyer and he told me I had better not sell on account of the income tax I would have to pay.

Cross-Examination.

272 I talked to Mr. Byczynski in September and in October and in November, 1965. He was introduced by Curtis Plautz.

275 I remember about Mr. Byczynski saying that he was going to sell to a steel mill and it was for tax purposes.

EDWARD J. BYCZYNSKI, being first duly sworn, testified as a witness on behalf of the Defendants as follows:

Direct Examination.

279 I am 58 years old and live on a 370-acre farm.

280 I have owned the farm 25 or 28 years.

280 Plaintiffs' Exhibit 4 contains my signature and the signature of my wife. It was signed November 19, 1964.

281 It was signed in Durley Boyle's office.

Plaintiffs' Exhibit 1 has my signature and my wife's signature. It was signed at my house.

282 Either in October or early November, 1964, I talked to Mr. Tighe and a man named Martin who said they wanted to buy property for the New York Central Development Corporation.

284 They said they wanted to buy my farm. I said it wasn't for sale.

288 I saw them again and told them it still wasn't for sale. They had a form they left with us. It was an option for the farm.

289 It was not filled in.

290-291 Mr. Tighe came out again to the farm early in November, 1964. He said the farm was appraised for about $350 per acre, and they would double the price of what the appraiser made it. They asked me who my attorney was, and I told him Durley Boyle did work for me.

292 I think he left us another form.

292-293 He came back a couple of days later and we came to the final price, which was in the neighborhood of $298,400 for the 370 acres.

He said he would take the contract to Durley Boyle, and when he got done with it we could go down and sign it.

297 Before the day I signed the contract, I talked to Mr. Boyle on two subjects. The first subject was the mineral rights. The second subject was exchange property for tax purposes. I was in his office about four times before I signed the option.

298 Those subjects were discussed on those four occasions.

300 Q. Did he say that this exchange property provision required you to go out and find property? A. No.

301 On the four occasions I was in Mr. Boyle's office, he said the clause in the option about exchange property was put in there for capital gains tax purposes. We would not have to pay any capital gains tax for the time being.

Mr. Boyle first brought to my attention this exchange property clause being put in the option.

303 I signed the option on November 19, 1964, and took the original of it. A duplicate was left there in Mr. Boyle's office.

303-304 I again talked with Mr. Tighe on the street in Hennepin in January, 1965, and told him the contract was wrong, and he would have to come back and make a new contract.

305 I told him we had to have more money and that the contract was wrong. I told him the contract read "per acre" instead of the total price. That is when he gave me more money.

307 Plaintiffs' Exhibit 1 was signed at my house.

321-322 At no time after November 19, 1964, up to September 15, 1965, nor after September 15, 1965, did plaintiffs say anything to me about acquiring property for exchange purposes.

Cross-Examination.

323-324 I did receive the letter dated July 9, 1965, (Plaintiffs' Exhibit 6) that said "We will notify you and you can then be assured of receiving the balance of the purchase price and be in position to look for exchange property."

324 I also got the letter dated September 14, 1965, (Plaintiffs' Exhibit 3) in which they told me "The option with you includes a provision that you may elect to trade your land for other suitable property of your choice if such suitable property is available. If you intend to make such a trade, it is important that you proceed promptly to select a property meeting your needs which is available for sale at a price satisfactory to you, taking into account the purchase price of your land." But I did not take that as a notice for looking for ground, and at the time, I didn't believe what they said when they wrote that letter.

I did not respond to that letter.

333 In November, 1964, I talked to Mr. Boyle on four separate occasions, however that is quite a while ago, and my recollection might not be accurate on every point.

I don't recall the first date that I talked to Mr. Boyle, and I don't recall the days I went in to see him, and I don't recall everything that was said on the first occasion.

334 I can't recall what words Mr. Boyle used when he talked about the exchange property clause.

335 Possibly Mr. Boyle on these occasions said something about how this clause would operate.

336 Q. You have told us that you do not remember everything that Mr. Boyle said. Isn't it possible, Mr. Byczynski, that he told you that the way this clause would operate is that it would save you paying capital gains, that you would go out and find a farm that was suitable to you and that they would get it and trade it to you and that would save you money? A. I can't answer that question.

336 That paragraph was put in there for capital gains and it was for my benefit.

337 Q. He might have said more? A. I don't know what he said.

I talked to the real estate men about this exchange property provision.

338-339 I understood enough about the exchange property provision so that I went out and talked to 7 or 8 different real estate people and looked at property with them, looked for exchange property for tax purposes.

339 And I made offers to try to purchase 3 different farms.

343 I told Mr. Tighe there was a mistake in the first option, and I had to have more money. Eventually, he increased the purchase price from $298,400 to $330,000.

344-345 Q. Now, Mr. Byczynski, you conferred with Mr. Tighe of the New York Central after the first option, got him to cancel it and to increase the price by over

$30,000. Isn't it a fact that the reason you haven't gone through with the second option is because you are trying to get more money out of the plaintiffs,
345 isn't that true? A. I can't answer it.

358 Clerk's Certificate of Transcript of Record.

PLAINTIFF'S EXHIBIT No. 2.
EXERCISE OF OPTION.

September 14, 1965

30 To: Edward J. Byczynski and Helena S. Byczynski, his wife, of Hennepin, Illinois

Subject: Option to Purchase Real Estate located in Putnam County, Illinois, dated February 16, 1965, between you, as optionor(s), and The New York Central Development Corporation, a Delaware Corporation (herein "New York Central"), as optionee.

You are hereby advised that the undersigned, New York Central, the holder and owner of the above described Option, hereby elects to exercise its option thereunder for the purchase of the property covered thereby on the terms and conditions set forth therein.

We would appreciate your acknowledgment of receipt of this form by signing and returning to us the duplicate copy hereof enclosed herewith for that purpose in the enclosed stamped, pre-addressed envelope.

Very truly yours,

The New York Central
Development Corporation,
By: (Signed),
President.

(SEAL)
Attest:
R. N. Carroll,
Secretary.

ACKNOWLEDGMENT.

Receipt of the foregoing Exercise of Option is hereby acknowledged this ..... day of ....., 1965.

PLAINTIFF'S EXHIBIT No. 3.
NEW YORK CENTRAL SYSTEM

The New York Central Development Corporation,
Suite 1203—139 West Van Buren Street,
Chicago, Illinois 60605,

Phone: Wabash 2-4200—Ext. 418.

September 14, 1965

32 *Mr. and Mrs. Edward J. Byczynski,*
Hennepin, Illinois.

DEAR MR. AND MRS. BYCZYNSKI:

Jones & Laughlin Steel Corporation has decided to proceed with acquiring land in Putnam County upon which options are now held in its behalf by The New York Central Development Corporation.

Accordingly, a notice in duplicate exercising the option from you is enclosed. Will you please sign the acknowledgment of receipt on one copy of such notice and return it in the enclosed stamped addressed envelope.

We, of course, want the acquisition program to proceed with as little inconvenience to you as possible. The option with you includes a provision that you may elect to trade your land for other suitable property of your choice if such suitable property is available. If you intend to make such a trade, it is important that you proceed promptly to select a property meeting your

needs which is available for sale at a price satisfactory to you, taking into account the purchase price for your land.

If the acquisition cost for the property which you select is greater than the remaining purchase price payable under the option, it will of course be necessary that you pay the difference. This difference will have to be supplied by you at the time when we execute the agreement to purchase the property that you select.

On the other hand, if the acquisition cost for the property which you select is less than the remaining portion of the purchase price due under the option, you will receive the difference in cash at the closing.

In order to handle this matter in an orderly manner, you should advise me before September 20, 1965, as to whether you wish to proceed with a real estate exchange or prefer a cash sale.

Upon receipt of advice from you, we will be glad to complete arrangements for the closing. I will be at Hennepin, Illinois on Thursday, September 16th and on Friday, September 17th, 1965 to answer any questions that I can.

Sincerely,

Frank Tighe.
/s/ Frank Tighe.

FPT:sv
encl.

PLAINTIFF'S EXHIBIT No. 4.

OPTION TO PURCHASE REAL ESTATE.

110 The undersigned Edward J. Byczynski and Helena S. Byczynski, husband and wife, each in his and her own right, and as spouse of the other, whose address is Hennepin, Illinois, hereafter known as "Seller", in consideration of $100.00, receipt acknowledged, does hereby give to The New York Central Development Corporation, or its nominee, hereafter known as "Purchaser", the option to purchase the following described real estate in Putnam County, Illinois:

The South Ten Acres of the West Half of the Northeast Quarter of Section 2, the North Half of the Southwest Quarter of said Section 2, the Southeast Quarter of the Southwest Quarter of said Section 2, and the West Half of the Southeast Quarter of said Section 2; Also, the North 3/8 of the East Half of the Northwest Quarter of Section 11, and the North 3/8 of the West Half of the Northeast Quarter of Section 11, all in Township 32 North, Range 2 West of the Third Principal Meridian, containing 270 acres more or less; situated in Putnam County, Illinois;

Also, the East Half of the Northwest Quarter of Section 12, and the West Half of the Southwest Quarter of the Northeast Quarter of Section 12, all in Township 32 North, Range 2 West of the Third Principal Meridian, situated in Putnam County, Illinois; containing 100 acres more or less;

Except the underlying coal and minerals together with the right to mine and remove same as may have heretofore been conveyed separate from the surface, and subject to existing easements of public and quasi-public utilities in, over and across said premises, and subject to existing easements of public highways over and across said premises.

The purchase price shall be $298,400.00, the exact area to be determined by survey. The following provisions shall govern:

1. The Purchaser may exercise this option on or before March 1, 1965, by giving written notice by United States mail addressed to the Seller at the above address. Upon payment of the sum of $29,840.00 to the Seller prior to March 1, 1965, this option shall be extended until March 1, 1966, and may be exercised in the same manner on or before that date. If this option is extended in this manner, said sum shall be applied as a part of the purchase price. Upon exercise of this option, the parties shall be bound by the following conditions:

A. Not less than thirty days nor more than sixty days after notice of exercise of this option, the Purchaser shall pay the unpaid balance of the purchase price to Seller. Purchaser shall also pay to seller value of any growing crops on premises when option exercised.

B. On that date, hereafter called the "closing date", Seller shall convey merchantable title in fee simple to the premises by good and sufficient warranty deed, free and clear of all liens and encumbrances, except taxes and special assessments levied or assesed on said premises subsequent to the closing date. Real estate taxes shall be prorated as of the closing date.

C. On the closing date, the Seller shall furnish a complete merchantable abstract or merchantable title guarantee policy brought down to the date of exercise of this option. The conveyance of above premises

is conditioned upon conveyance of suitable exchange property to seller. Seller will sell only if suitable exchange property cannot be acquired by purchaser.

2. Immediately upon receipt of notice of exercise of this option, the Seller shall serve notices of termination of leases on all tenants of said property, and hereby appoints Purchaser as his agent for such purpose.

3. If said premises and buildings thereon are damaged or destroyed or substantially changed between the date of this option and the closing date, the purchase price shall be decreased by the appraised cost of repairing or replacing same, not to exceed amount of insurance carried by seller.

4. As a part of this agreement, the Seller hereby gives to the Purchaser, and its agents, employees and assigns, the right to enter the above described real estate for the purpose of making surveys, borings, soil tests and such other engineering tests as Purchaser deems necessary. Purchaser shall pay any damages sustained by seller by reason thereof if this option is not exercised.

5. This instrument shall be binding upon the heirs, assigns, successors, and nominees of the parties.

Dated at Hennepin, State of Illinois, this 19th day of November, 1964.

Witnesses:

WALTER DORLEY BOYLE,
JENNIE MIGLIO,

EDWARD J. BYCZYNSKI,
HELENA S. BYCZYNSKI.

PLAINTIFF'S EXHIBIT No 5.

Hennepin, Ill.
April 30, 1965

153 DEAR MR. M. BREESE:

In regard to the Options your firm acquired from New York Central Corporation as I am one of the Land owners and my option has a Clause in for the Company to exchange Land with me that is suitable to me, as I would like to go out and look for same.

Would like to meet with you as soon as possible when you are in this part of Illinois at your earliest convenience.

As I talked with Mr. J. Shaffer today and he gave me your address and told me you were the gentleman that would take care of the real estate part for your Company.

As I have 370 acres on option with you.

And is rather hard to replace a farm of this size and condition in which it is.

Hoping to hear from you at your earliest convenience or rather hoping to meet you.

Sincerely yours,

EDWARD BYCZYNSKI,
Hennepin, Illinois Code 61327.

P.S. Please let me know when you will be in Hennepin.
Thanking you in advance.

PLAINTIFF'S EXHIBIT No. 6.

July 9, 1965

Mr. Edward Byczynski,
Hennepin,
Illinois 61327

DEAR MR. BYCZYNSKI:

155 Receipt is acknowledged of your letter bearing the date of April 30, 1965. I have been holding this pending a positive decision to exercise the options held by New York Central Development Corporation. This decision must be made by our Board of Directors which will meet later in July. I am pleased to report that the situation looks very favorable and we hope for early approval.

When favorable action is received, we will notify you and you can then be assured of receiving the balance of the purchase price and in position to look for exchange property.

We are quite pleased with the Hennepin site and anxious to develop it in an orderly manner and become an acceptable part of the local community.

I expect to be in Hennepin before long and will look forward to meeting you personally.

Respectfully submitted,

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SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 865

THE NEW YORK CENTRAL DEVELOPMENT CORPORATION, A DELAWARE CORPORATION, AND JONES & LAUGHLIN STEEL CORPORATION, A PENNSYLVANIA CORPORATION,

Plaintiffs-Respondents,

vs.

EDWARD J. BYCZYNSKI AND HELENA S. BYCZYNSKI,

Defendants-Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Plaintiffs-Respondents,

vs.

EDWARD J. BYCZYNSKI AND HELENA S. BYCZYNSKI,

Defendants-Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED.

This case involves the interpretation of one particular clause in a contract for the sale of farm land under one particular factual situation. That clause had been insisted upon and drafted by the attorney for the sellers. Its operation, purpose and effect had been discussed by him with representatives of the purchaser (A. 28-31). The attorney then told his clients what the purpose and effect of the clause was and how it could be put into operation (A. 31-32). In the words of the Petition for Certiorari (p. 3), regarding the disputed evidence, the attorney

"allegedly told them shortly before the contract was executed that it was their obligation to locate the desired exchange property and that the purchaser, respondents herein, would not make any attempt to locate it." In the courts below, the sellers (petitioners herein) sought to exclude the attorney's testimony that he had informed them of his discussion and agreement with respondents as to how his clause would operate and its purpose and effect.

No communication to an attorney is involved in this petition. The dispute concerns merely the communication of information to the sellers which their attorney had already discussed with the representatives of the purchaser. The sellers were represented throughout the litigation below by attorneys different from the attorney who had represented them in the negotiations for the sale of the property.

The question presented is: Did the court below deny petitioners the right to the aid of counsel at the trial of this civil lawsuit when the court held that testimony as to a non-confidential statement by an attorney to his clients of information previously discussed by him with the other party was not privileged against disclosure?

STATEMENT OF THE CASE.

The Statement of the Case contained in the Petition filed herein omits some of the facts and is misleading as to others. Here briefly is what happened in somewhat more detail than the Illinois Appellate Court deemed necessary to its decision.

The New York Central Development Corporation, acting for itself and for Jones & Laughlin Steel Corporation, plaintiffs-respondents herein, obtained options on a number of parcels of real property in Putnam County, Illinois (A.

33), as a site for a steel plant. As part of this acquisition, defendants-petitioners contracted to sell 370 acres of pasture and crop land to plaintiffs for $298,400 by an Option dated November 19, 1964 (Pl. Ex. 4, A. 56, R. 110). When the terms of this contract were negotiated, defendants' attorney, Walter Boyle, insisted upon a clause allowing for a possible exchange of property to permit defendants to avoid present payment of any capital gains tax if defendants so desired (A. 30, 34). Defendants' attorney drafted language for such an exchange property clause and added such language by typewriter onto the mimeographed form of Option Contract used by plaintiffs (A. 28, 35). This language is:

> C. "... The conveyance of above premises is conditioned upon conveyance of suitable exchange property to Seller. Seller will sell only if suitable exchange property cannot be acquired by purchaser" (A. 6).

Subsequently defendants claimed this Option had an error because on their copy the words "per acre" had not been stricken at the place the total price of $298,400 was shown. Defendants then demanded more money and other concessions (A. 50). On February 16, 1965, plaintiffs agreed to increase the price to $330,000 plus other concessions (A. 52). The first Option was torn up and a second Option was signed (Pl. Ex. 1, A. 4, R. 24) with the identical clause for exchange property included (A. 33).

The words used by defendants' attorney in that clause were not clear as to whether the defendants or the plaintiffs had the task of locating "suitable exchange property," in the event defendants wanted an exchange. However, from the time the contract was signed until just before the date set for closing, the correspondence between the parties (A. 59, 60, 54) and the activity of the defendants (A. 52) indicate that both plaintiffs and defendants inter-

preted the contract as requiring defendants to locate exchange property suitable to defendants in price, location, size, and topography, if defendants wanted to receive other property as all or part of the price for their 370 acres.

This also was the understanding of the parties, as related by defendants' attorney (A. 32), and was in accord with his instructions, and an agreement he secured from plaintiffs (A. 30) that the plaintiffs were not to go around looking for exchange property since such activity would only serve to increase the price because of plaintiffs' corporate identities (A. 30). In fact, defendants spent considerable time looking at and negotiating for exchange property they deemed suitable. As soon as the news got out that plaintiffs had exercised the Options to purchase the land from Mr. and Mrs. Byczynski, and from their neighbors, 40 to 50 real estate people came out to talk about exchange property with Mr. Byczynski (A. 24, 25, 39). Mr. Byczynski, in turn, went out and talked with 7 or 8 real estate brokers and looked at property with them, looking for "exchange property for tax purposes" (A. 52). Mr. Byczynski followed up this search by making offers to try to purchase three of these farms (A. 52).

Plaintiffs exercised their option to complete the purchase of the Byczynski property on September 14, 1965 (A. 2, 8) and the closing was set for November 15, 1965. However, on September 16, 1965, Mr. Byczynski told plaintiffs that 60 days was not enough time for him to locate exchange property and he sought to have the closing date extended from November 15, 1965, to March 1, 1966 (A. 42). When plaintiffs declined this and other demands, defendants refused to appear at the closing (A. 47) and have refused to perform in accord with their contract.

Plaintiffs had previously paid defendants $33,000 as a down payment on the purchase price (A. 2, 4) and thereupon brought this action to require defendants to convey

the 370 acres in question for the fixed price of $330,000 (less the $33,000 already paid) and under the terms of the contract (A. 4, 5, 6, 7) signed by defendants.

THE WRIT SHOULD NOT BE GRANTED.

I.

There Was No Denial of Any "Privileged Communications" Rule Between Attorney and Client. The Court Found Factually That the Communications Did Not Originate in Confidence, But Rather Were Intended to Be Disclosed, and Thus Fell Within the Recognized Exception to the Attorney-Client Privilege.

The decision in this case involves the interpretation of one clause in one contract for the sale of farm land under factual circumstances which hardly could recur.

The opinion does not conflict with other decisions. Instead, it follows legal principles long accepted in Illinois, in other states and in the federal courts.

When petitioners claim a violation of a constitutional privilege, they really ask this Court to ignore the facts of this controversy and to forget the many decisions in Illinois and elsewhere which are directly in point to show there was no privilege involved here but rather a well-recognized exception to the limited rule of privilege.

The petition indicates (at page 2) that petitioners sought an appeal to the Illinois Supreme Court as a matter of right. Petitioners neglect to state they also asked that Court for an appeal under the Court's discretionary power. They made this same constitutional argument seeking such appeals and were turned down in each instance for the good reason that their argument is spurious and without

substance. They were not denied counsel in any instance. There was no hearing or proceeding in this entire controversy at which petitioners were not represented.

Despite their argument, one notes that petitioners do not say they ever lacked counsel. Instead petitioners really argue their counsel should not be permitted to speak the truth concerning a discussion between that attorney and respondents which the attorney then relayed to petitioners. There is hardly a constitutional question here.

The California appellate case *Prudential Ins. Co.* v. *Small Claims Court*, 173 P. 2d 38 (Dist. Court of Appeal, First Dist., Division 1, Calif., 1946) and *Miranda* v. *Arizona*, 384 U. S. 436 (1966), mentioned at pages 14-15 of the Petition have no application, even remote, to this *civil* proceeding. Petitioners' claims about denial of counsel, constitutional questions, and the testimony of Walter Boyle are not germane to the interpretation of the one clause in the real estate contract.

That clause was drafted by petitioners' attorney and was somewhat vague and ambiguous. The intent, as everyone admitted, was to permit the petitioners (who were the sellers under the real estate contract), if they desired, to take all or part of the purchase price, for the land they were selling, in the form of other property, to be exchanged with them, so as to postpone their liability for payment of any federal capital gains tax. The only issue was as to who had the obligation to select exchange property suitable to the petitioners, in the event petitioners decided to use that tax saving device. This was not even an issue until a few days before the closing, when petitioners came up with an argument, in an attempt to avoid their obligation under the contract, that it was the job of the respondents herein to select such property, suitable to petitioners.

The position of the respondents, however, was that if

petitioners wanted to receive exchange property, a procedure which was entirely for petitioners' benefit as a tax saving device, then petitioners themselves should select such property as would be suitable to them in an exchange. This position was never challenged by the petitioners until the last minute.

The testimony of Walter Boyle, while significant, *was only one small portion of all the evidence* at the trial which clearly revealed it was the duty of the petitioners to locate property suitable to themselves. As the decision of the Illinois Appellate Court states (see Appendix B to the Petition, p. App. 8):

> "There is no possible doubt under the evidence in this case that Mr. Byczynski knew he was to select property suitable to him for exchange purposes. He testified that in the course of his search he actually made offers for three different farms. His offers were rejected.
>
> Months later in September of 1965 the plaintiffs notified defendants they were exercising the option. Thereafter, on September 16, 1965, Mr. Byczynski met with representatives of the plaintiffs. At that meeting he complained that he was not given enough time to locate exchange property and asked for an extension to March 1, 1966.
>
> Since it is established without controversy that defendants were to select exchange property pursuant to their agreement and they acted upon that agreement in an effort to acquire it, it follows that the defense in this case, in which it is asserted that the plaintiffs were supposed to seek out and procure exchange property, was contrary to the facts."

Petitioners were not bothered by any constitutional questions—that argument is nothing more than an afterthought. The real problem encountered by petitioners was that the facts and the evidence were so clear against them.

Petitioners discuss the attorney-client privilege at con-

siderable length and go into detail as to the horrors which may arise where the privilege is not permitted.

However, petitioners have completely ignored the well-recognized exception to this privilege presented by our factual situation.

Initially, one notes, that since "the privilege tends to prevent a full disclosure of the truth, it should be strictly construed . . ." 97 C. J. S. Witnesses ¶ 276, p. 784. Then the privilege can only be claimed if the communication was confidential to begin with:

> "The privilege assumes, of course, that the communications are made with the intention of confidentiality." 8 Wigmore, Evidence ¶ 2311 (McNaughton rev. 1961).

In *Houdek* v. *Ehrenberger,* 397 Ill. 62, 72 N. E. 2d 837 (1947), it was said (p. 69):

> ". . . the communications . . . were not privileged because it does not appear they originated in a confidence that they would not be disclosed . . ."

There never was an intent that the conversation in question in this lawsuit be confidential. Walter Boyle talked to the representatives of the respondents herein when Boyle was drafting the contract clause for "suitable exchange property." In discussing how that clause would be used Boyle told the representatives of the respondents that he did not want anyone from the railroad or Jones & Laughlin going about negotiating for exchange property because this would only drive up and increase the prices for exchange property which would ultimately be charged against his clients. The agents for the respondents agreed to this. Boyle then talked to the petitioners and explained to them how the exchange property clause might save tax money for them and how that clause would work. He told petitioners that it was up to the property owners (here the

petitioners) to locate any exchange property, and they could go out and look for such exchange property without any interference from the railroad or Jones & Laughlin (A. 30, 31, 32).

This conversation explaining the agreement Boyle had reached with the representatives of respondents was not confidential and could not be subject to a claim of privilege. It was intended that the communication be disclosed. In this connection, the decision in *Dickerson* v. *Dickerson,* 322 Ill. 492, 153 N. E. 740 (1926) is most appropriate. In discussing circumstances similar to ours, that decision held (p. 501):

> "Obviously, where a transaction between attorney and client is of such a nature that a disclosure by the attorney is necessary to effectuate the intention of the client the transaction does not originate in a confidence that the transaction will not be disclosed, and the element of confidentiality is not essential to the full and satisfactory maintenance of the relation by the parties and is therefore not privileged."

Dickerson is a truly landmark case in this area of the law —not only in Illinois but throughout this country.

Dickerson was followed and reaffirmed by *Spencer* v. *Burns,* 413 Ill. 240, 108 N. E. 2d 413 (1952).

Most recently this question came up in the celebrated Illinois *Monier* decisions liberalizing discovery procedures. When that proceeding was before the Third District Illinois Appellate Court (*Monier* v. *Chamberlain,* 66 Ill. App. 2d 472, 213 N. E. 2d 425, 1966) that Court stated, p. 486:

> "Where, from the nature of the communication between client and attorney, and the purpose to be served by such communication it is evident that the parties intended such communication to be disclosed, no privilege against disclosure exists."

Thereafter that decision was affirmed by the Illinois Supreme Court, *Monier* v. *Chamberlain,* 35 Ill. 2d 351, 221 N. E. 2d 410 (1966), the Court stating (p. 358):

> "Under these circumstances, we believe that one of the essential conditions precedent to the attachment of the attorney-client privilege, *i.e.,* that the commnications must originate in a confidence that they will not be disclosed, cannot be said to exist."

Various federal courts have considered this same situation and consistently have held there is no privilege.

In re Ruos, 159 Fed. 252 (D. C. E. D. Pa., 1908), discussed two facets of the privilege claim, each of which are present in our case. At page 256, the court quoted Prof. Wigmore saying, "When the attorney is made a witness to attest the execution of a document (and not merely to draft it), there is no confidence contemplated, and therefore no privilege. . . ." At page 257, "An attorney called as a witness is bound to testify to any matters which came to his knowledge in any other way than through confidential communication from his client."

Walter Boyle signed the contract as a witness to the execution of the contract by petitioners (Pl. Ex. 4, A. 56, 58, R. 110). His testimony related to matters he first discussed and agreed upon with the employees of respondents and then repeated to petitioners (A. 30, 31, 32).

To the same effect, see Judge Wyzanski's holding in *United States* v. *United Shoe Machinery Corp.,* 89 F. Supp. 349, 359 (D. C. Mass., 1950) and Judge Kaufman's statement in *Comercio, et al.* v. *Dresser Industries, Inc., et al.,* 19 F. R. D. 513 (D. C. S. D. N. Y., 1956) at page 514,

> "The privilege should certainly not be extended to communications between an attorney and his client pertaining to the attorney's negotiations with a third party over terms and details of business transactions. See *Radio Corporation of America* v. *Rauland Corporation,* D. C. N. D. Ill., 1955, 18 F. R. D. 440."

II.

The Decision Below Is Correct.

The law of contracts is the law of our business community. In general, it is law based upon common sense and accepted principles of fair dealing in the particular factual situation facing the parties.

That is really all this lawsuit involved—the interpretation of a written promise by petitioners using common sense to consider the particular facts of the matter.

The Illinois Appellate Court found those facts were "established without controversy" and in favor of the respondents to this petition. On the one key issue in the controversy—who was to select suitable exchange property —the Court states:

> "There is no possible doubt under the evidence in this case that Mr. Byczynski knew he was to select property suitable to him for exchange purposes."

The Appellate Court correctly decided the matter following undisputed principles of Illinois law, as noted in ten decisions cited in their opinion.

CONCLUSION.

There is no constitutional issue here. Instead, the facts fall within a well recognized exception to a limited rule of privilege.

The Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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